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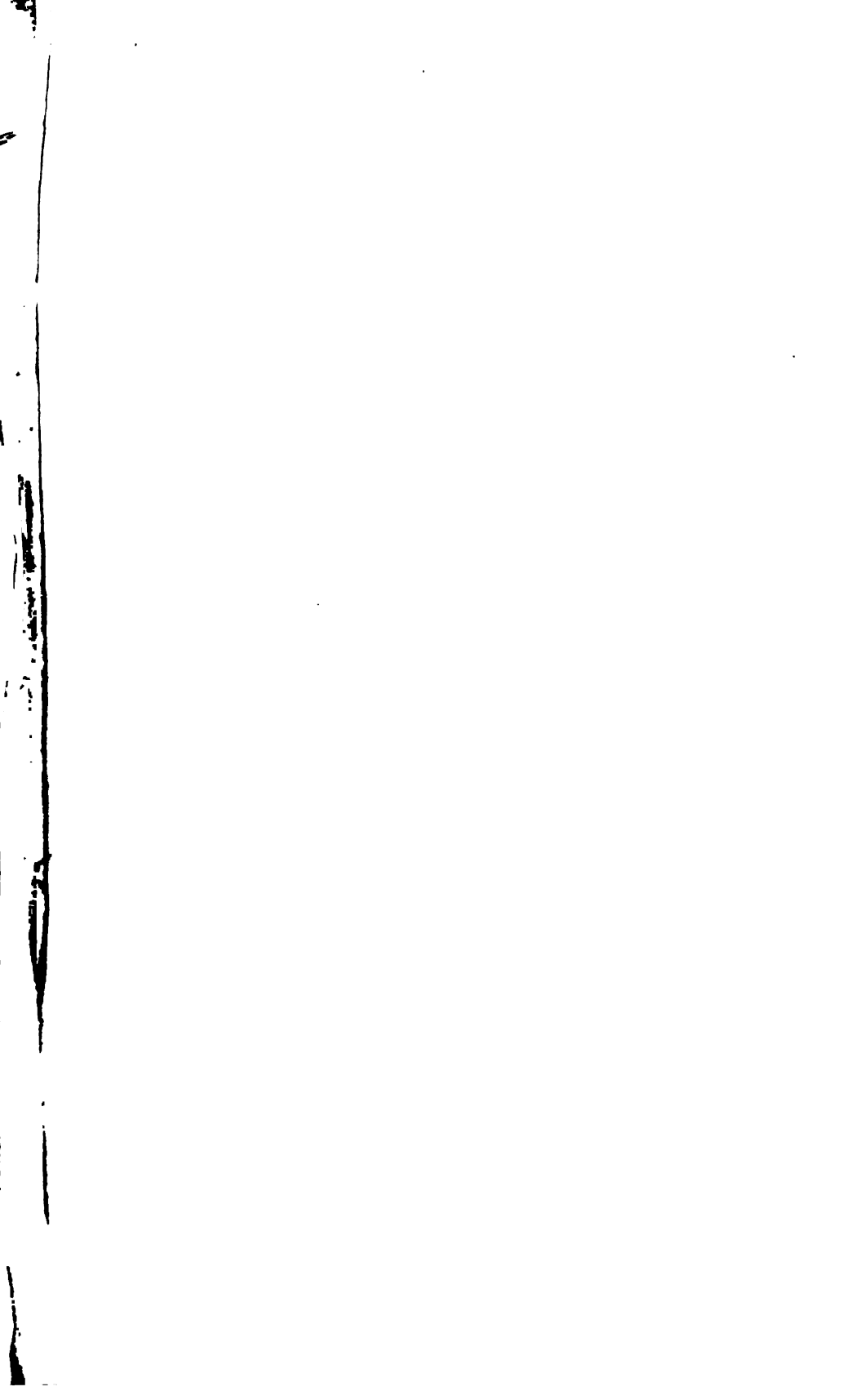
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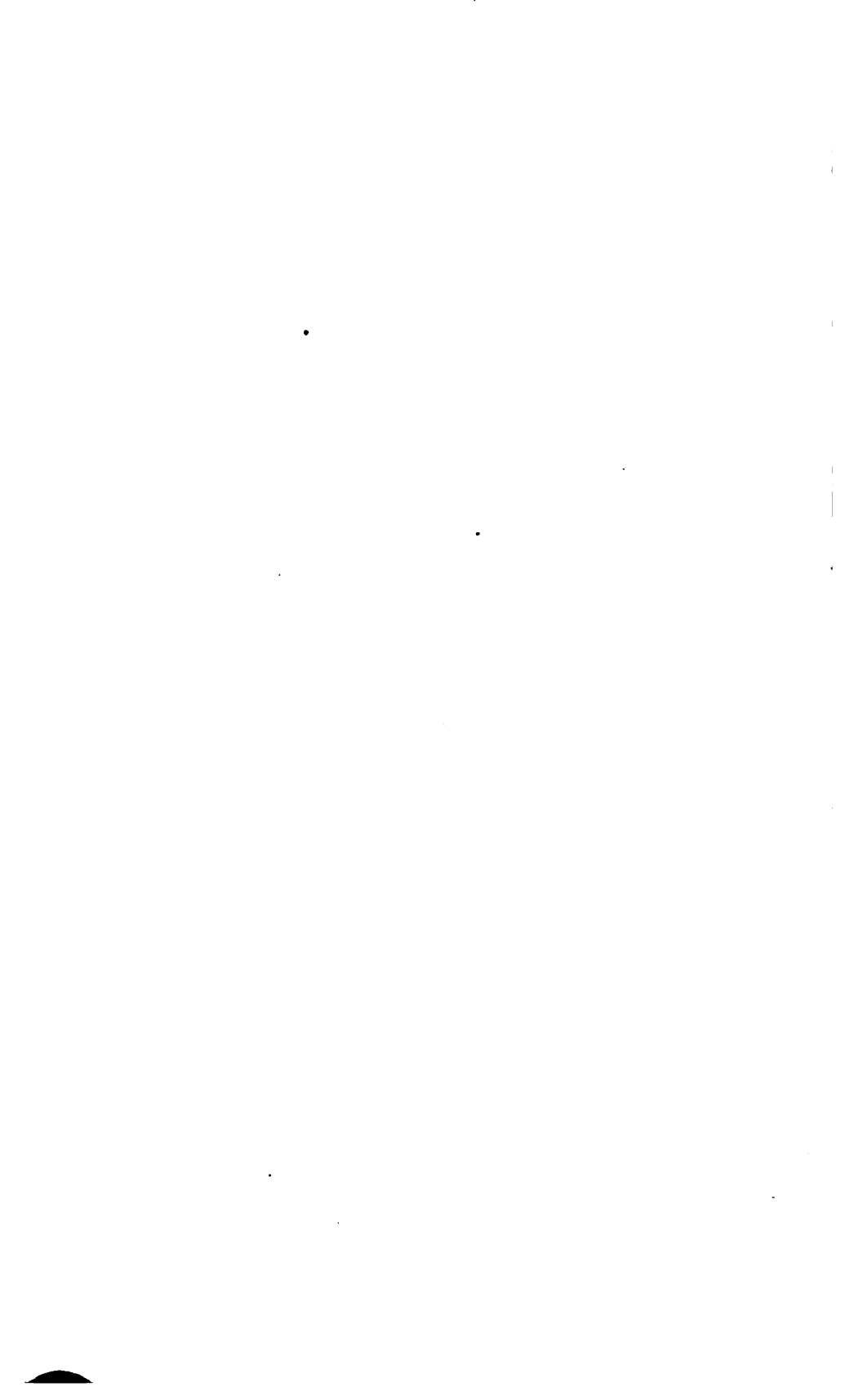


7

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VOL. 57—IOWA REPORTS.

57 11	57 179	57 421	57 662
59 378	69 657	68 125	61 733
57 30	57 187	73 45	66 643
58 578	63 738	74 168	68 710
61 349	57 197	76 20	68 725
57 23	57 747	57 423	69 132
57 751	60 139	67 505	73 720
68 593	65 549	57 440	76 527
70 355	67 709	58 225	57 683
71 46	75 633	57 444	60 559
74 451	76 240	57 458	62 294
57 37	57 301	57 474	62 225
57 666	65 441	57 653	76 366
59 465	57 303	57 486	57 691
61 733	59 422	66 698	63 701
69 21	57 210	57 493	57 705
73 499	68 69	61 100	65 676
77 369	57 221	57 519	57 712
57 49	59 78	58 40	58 136
68 219	60 79	74 187	64 691
68 221	57 237	57 538	69 497
57 56	57 755	60 434	76 296
57 226	59 494	57 541	76 300
59 509	60 750	71 143	57 718
57 58	61 501	73 231	71 312
69 97	66 362	57 555	57 733
77 384	68 722	68 607	64 242
77 386	57 229	57 560	66 757
57 66	76 701	73 509	68 722
57 178	57 345	57 573	57 745
76 139	57 646	59 289	72 125
57 75	65 241	61 690	75 633
74 216	67 567	57 596	57 748
57 77	74 563	62 41	58 45
56 348	57 349	63 42	64 254
57 490	77 224	66 571	65 467
57 88	57 256	67 478	68 593
57 650	63 265	70 270	71 46
57 101	74 718	72 328	74 451
66 253	57 291	57 601	75 317
57 103	61 576	60 531	57 754
61 674	64 16	61 637	61 501
74 370	57 307	73 246	62 443
57 127	65 203	57 613	
58 743	69 135	69 563	
76 393	57 320	57 623	
57 130	72 277	62 490	
60 71	75 682	57 630	
60 72	76 294	69 44	
60 73	57 336	74 109	
60 76	67 613	76 273	
60 77	71 318	57 636	
66 158	57 344	59 602	
71 92	60 91	75 398	
76 562	57 268	77 411	
57 144	75 224	57 644	
63 720	57 286	69 508	
57 151	64 74	57 651	
59 419	71 556	59 296	
57 157	57 303	60 384	
67 112	60 743	57 656	
68 115	60 744	68 382	
57 180	60 745	74 268	
75 162	61 590		
57 184	70 109		
68 470			
57 171			
64 560			





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7

REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

By B. W. HIGHT,
REPORTER.

VOL. I,
BEING VOLUME LVII OF THE SERIES.

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JUDGES AND OFFICERS OF THE SUPREME COURT

AS AT PRESENT CONSTITUTED.

HON. WILLIAM H. SEEVERS, Oskaloosa, Chief Justice.
" JAMES G. DAY, Sidney,
" JAMES H. ROTHROCK, Cedar Rapids, } Judges.
" JOSEPH M. BECK, Fort Madison,
" AUSTIN ADAMS, Dubuque, }

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ATTORNEY GENERAL.

SMITH McPHERSON, Red Oak.

REPORTER.

B. W. HIGHT, Council Bluffs.

JUDGES OF THE DISTRICT AND CIRCUIT COURTS.

1ST DISTRICT..ABRAHAM H. STUTSMAN, District Judge.
WILLIAM J. JEFFRIES, Circuit Judge.
CHARLES H. PHELPS, Circuit Judge.
2D DISTRICT..EDWARD L. BURTON, District Judge.
H. C. TRAVERSE, Circuit Judge.
3D DISTRICT..R. C. HENRY, District Judge.
D. D. GREGORY, Circuit Judge.
4TH DISTRICT..CHARLES H. LEWIS, District Judge.
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CHARLES W. CHASE, Circuit Judge.
DE WITT C. RICHMAN, Circuit Judge.
8TH DISTRICT..JOHN SHANE, District Judge.
CHRISTIAN HEDGES, Circuit Judge.
9TH DISTRICT..SYLVESTER BAGG, District Judge.
BENJAMIN W. LACY, Circuit Judge.
10TH DISTRICT..E. E. COOLEY, District Judge.
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12TH DISTRICT..GEORGE W. RUDDICK, District Judge.
ROBERT G. REINIGER, Circuit Judge.
13TH DISTRICT..JOSEPH R. REED, District Judge.
C. F. LOOFBOUROW, Circuit Judge.
14TH DISTRICT..ED. R. DUFFIE, District Judge.
JOHN N. WEAVER, Circuit Judge.



TABLE OF CASES

REPORTED IN THIS VOLUME.

A.		PAGE.
Abbott v. Sartori.....	656	
Adamson et al., Ryan v.....	30	
Alcott et al., Haverly v.....	171	
Aldrich v. Price & Co.....	151	
Alexander v. McGrew et al..	287	
Allen v. The B., C. R. & N. R. Co.....	623	
Allen, The State v.....	431	
American Express Co. v. Smith & Crittenden et al.....	242	
American Insurance Co., Han- sen v.....	741	
Anderson v. Park.....	69	
Anderson, Robertson v. . . .	165	
Austin v. Wilson et al.....	583	
B.		PAGE.
Baker et al., The First Na- tional Bank of Davenport v.	197	
Baldozier v. Haynes et al . .	683	
Baldwin v. The Oskaloosa Gas Light Co.....	51	
Baldwin, The State v.....	266	
Barhydt & Co. v. Perry et al..	416	
Barker, Johnson v.....	32	
B., C. R. & N. R. Co., Allen v.	623	
B., C. R. & N. R. Co., Herri- man v.....	187	
B., C. R. & N. R. Co., Rush et al. v.....	201	
Benedict, Getchell et al. v....	121	
Bennett v. Carey.....	221	
Bennett v. Phillips.....	174	
Bitzer, Garretson v.....	469	
Blair et al. v. Wilson.....	177	
Blake et al., Muir v.....	662	
Bolster v. Post.....	698	
Bradley v. Gelkinson.....	300	
Bradley & Sherman v. Dela- ware County.....	552	
Bradshaw v. Hurst et al.....	745	
Bright et al., Decatur County v.....	724	
Brockway v. Haller.....	368	
Brown, The State v.....	759	
Bruley v. Rose et al.....	651	
Burch, Martindale v.....	291	
C.		PAGE.
Carey, Bennett v.....	221	
Cassady v. Spofford et al.....	237	
C., B. & Q. R. Co., Hickenbot- tom v.....	704	
C., B. & Q. R. Co., Long et al. v.	687	
C., B. & Q. R. Co., Reusch et al. v.....	687	
C., B. & Q. R. Co., Slocumb v..	675	
Central Railway Co., Robert- son v.....	376	
Chase v. Welty.....	230	
Cheney, Floyd County v.....	160	
C. I. R. Co. v. The M. & A. R. Co.....	249	
C. I. R. Co., Mundhenk v.....	718	
City of Centerville v. Miller..	56	
City of Centerville v. Miller..	225	
City of Centerville, Miller v..	640	
City of Council Bluffs, Dodge et al. v.....	560	
City of Des Moines, Grimmell v	144	
City of Muscatine, Fulleam v.	457	
City of Muscatine, Hoehl v....	444	
City of Oskaloosa, Stafford v.	748	
Clark v. Haynes.....	96	
Clews v. Traer et al.....	459	
C., M. & St. P. R. Co., Lance v.	636	
C., M. & St. P. R. Co., Lewis v.	127	
Coldren et al., Thayer v.....	110	

	PAGE.		PAGE.
Cole, Gifford v.....	272	First National Bank of Davenport v. Baker et al.....	197
Collins v. Davis et al.....	256	Fisher v. Lane.....	334
Conger v. Cook.....	49	Floyd County v. Cheney.....	160
Connehan, The State v.....	351	Fowler et al., Thorpe Bros. & Co., v.....	541
Conwell v. House et al.....	754	French, Thompson v.....	559
Cook, Conger v.....	40	Fulleam v. The City of Muscatine.....	457
Crowdson v. Middleton.....	335	Furman v. The C., R. I. & P. R. Co.....	42
Crispin v. Winkleman.....	523		
C., R. I. & P. R. Co., Furman v.	42		
C., R. I. & P. R. Co., Lawson v.	672		
C., R. I. & P. R. Co., Meyers v.	555		
C., R. I. & P. R. Co., Reed v..	23		
Cunningham v. Gamble.....	46		
		G.	
D.		Gambert, Davis v.....	280
Davis County, Ferguson v....	601	Gamble, Cunningham v.....	46
Davis et al., Collins v.....	256	Garretson v. Bitzer.....	469
Davis v. Gambert.....	239	Gear et al. v. Schrei et al.....	666
Dayton, Miller v.....	423	Gelkinson, Bradley v.....	300
Day, Weir v.....	84	Germania Fire Insurance Co., Wilkins v.....	520
Decatur County v. Bright et al	724	Getchell et al. v. Benedict....	121
Dee v. Downs.....	580	Giddings v. Giddings.....	297
Deeds et al., Roberts v.....	320	Gifford v. Cole.....	272
Delaware County, Bradley & Sherman v.....	552	Green et al., Truesdell v.....	215
Delier v. The Plymouth Co. Agricultural Society.....	481	Gregory et al., Hadley v.....	157
D. M. & Ft. D. R. Co., Drady v	393	Grimmell v. The City of Des Moines.....	144
Desney, Thomas v.....	58	Grover, Merritt et al. v.....	493
Dewey v. Lins et al.....	235		
Dimick v. Hinkley et al.....	757		
Dodge et al. v. The City of Council Bluffs et al.....	560	H.	
Douglass v. Kessler et al.....	63	Hadley v. Gregory et al.....	157
Downs, Dee v.....	580	Hall et al., Roby v.....	213
Drady v. The D. M. & Ft. D. R. Co.....	303	Haller, Brockway v.....	368
Dumond, The State v.....	333	Hamilton et al. v. Smith et al.	15
Dupuy & Howell v. Sheak & Sharra.....	361	Hamilton, The State v.....	506
Dutton, Woodman v.....	442	Hamlin, Hough v.....	359
		Hanna et al., Marshall Co. v..	372
E.		Hansen v. The American Insurance Company.....	741
Easton et al., Jarosh v....	569	Harrison County et al., Noyes et al. v.....	312
Easton v. Strother & Conklin et al.....	506	Harrison v. Owens.....	314
Emsley et al., Long v.....	11	Hart v. Jackson.....	75
Eshleman et al., Lewis et al. v	633	Haverly v. Alcott et al.....	171
Eshleman, The State v.....	759	Haverly & McDonald v. McClelland.....	182
		Haynes, Clark v.....	96
F.		Haynes et al., Baldozier v.....	683
Ferguson v. Davis County....	601	Hawkeye Insurance Company, Hopkins v.....	203
Ferguson, Hoopes v.....	39	Henderson, Tiffany v.....	490
Fields et al., Jones v.....	317	Henry et al. v. Taylor et al..	72
First National Bank of Bellaire, Ohio, v. Mason & Co..	105	Herriman v. The B., C. R. & N. R. Co.....	187
		Hickenbotton v. The C., B. & Q. R. Co.....	704
		Hickenbotton, Smith v.....	733

CASES REPORTED.

7

	PAGE.
Hinkley et al., Dimick v.....	757
Hoehl v. The City of Muscatine.....	444
Holt et al., Webb et al. v.....	712
Hoopes v. Ferguson.....	39
Hopkins v. The Hawkeye Insurance Company.....	203
Hough v. Hamlin et al.....	359
House et al., Conwell v.....	754
Howe & Co. v. Jones et al.....	130
Hoyt et al., Knapp v.....	591
Hurst et al., Bradshaw v.....	745
Hyler v. Wellington.....	413

I.

Iowa State Insurance Company, Otterbein v.....	274
Irish, Wilson v.....	184

J.

Jackson, Hart v.....	75
Jackson, Wilcox v.....	278
Jarosh v. Easton et al.....	569
Jay, The State v.....	164
Jewell v. Reddington.....	92
Jiska v. Ringgold County et al.....	630
Johnson v. Barker.....	32
Jones v. Fields et al.....	317
Jones et al., Howe & Co. v.....	130
Jones, Pennington v.....	37

K.

Kelley, The State v.....	644
Kelsey v. Kelsey et al.....	383
Kelso, Rice v.....	115
Kendig, Shaw v.....	390
Kessler et al., Douglass v.....	63
Kirt et al., Meyers v.....	421
Kline et al. v. Kline et al.....	386
Knapp v. Hoyt et al.....	591
Knapp et al., Martin v.....	336
Knowles, The State v.....	669
Kows v. Mowery.....	20
Krewsen, The State v.....	583

L.

Lance v. The C., M. & St. P. R. Co.....	636
Lane, Fisher v.....	334
Lash v. Lash et al.....	88
Latham et al. v. Myers.....	519
Lawrence v. Smith.....	701
Lawson v. The C., R. I. & P. R. Co.....	672

	PAGE.
Lee, McIntosh v.....	356
Lendrum, Oswego Starch Factory v.....	573
Leonard v. Lining.....	648
Lewis et al. v. Eshleman et al.....	633
Lewis v. The C., M. & St. P. R. Co.....	127
Lining, Leonard v.....	648
Lins et al., Dewey v.....	235
Livingston, University of Des Moines v.....	307
Lombard et al., Smeltzer v.....	294
Logan v. Maytag.....	107
Long et al. v. The C., B. & Q. R. Co.....	687
Long v. Emsley et al.....	11
Long v. Long.....	497
Loomis v. McKenzie.....	77
Lucas, The State v.....	501
Lufkin & Wilson v. Preston..	28

M.

Malli v. Willett.....	705
Marshall County v. Hanna et al.....	372
Marsh v. Mead & Co. et al.....	535
Martindale v. Burch.....	291
Martin v. Knapp et al.....	330
Mason & Co., First National Bank of Bellaire, Ohio, v.....	105
Masteller, Parkhurst v.....	474
Maytag, Logan v.....	107
McClain v. McClain.....	167
McClelland, Haverly & McDonald v.....	182
McFaul v. Woodbury County.....	99
McGrew et al., Alexander v.....	237
McIntosh v. Lee.....	356
McKenzie, Loomis v.....	77
McMillan et al., Wetmore v.....	344
McWaid, Young v.....	101
Mead & Co. et al., Marsh v.....	535
Merritt et al. v. Grover.....	493
Mewhirter, Witt, Guardian, v.....	545
Meyers v. Kirt et al.....	421
Meyers v. The C., R. I. & P. R. Co.....	555
Middleton, Crewdson v.....	335
Miller v. Dayton.....	423
Miller, Searcy v.....	613
Miller, The City of Centerville v.....	56
Miller, The City of Centerville v.....	225
Miller v. The City of Centerville et al.....	640
Miller, The State v.....	758
Mitchell, Rivers v.....	193
Mowery, Kows v.....	20

	PAGE.		PAGE.
Muir v. Blake et al.	602	Ringgold County et al., Jiska v.	630
Mullen v. Peck.	430	Rivers v. Mitchell.	193
Mundhenk v. The C. I. R. Co.	718	Rix & Stafford v. Silkknitter.	262
Murray v. Wella.	26	Robertson v. Anderson.	165
Myers, Latham et al. v.	519	Robertson v. The Central Rail- way Co.	376
M. & A. R. Co., The C. I. R. Co. v.	249	Roberts v. Deeds et al.	320
N.		Roby v. Hall et al.	213
Newton et al., Tracy v.	210	Rose et al., Bruley v.	651
Noyes et al. v. Harrison Co. et al.	312	Rush et al. v. The B., C. R. & N. R. Co.	201
O.		Ryan v. Adamson et al.	30
Older, Small v.	320	S.	
Oskaloosa Gas Light Co., Bald- win v.	51	Sartori, Abbott v.	656
Oswego Starch Factory v. Len- dum.	573	Schlapkahl et al., Otto et al. v.	226
Otterbein v. The Iowa State Insurance Co.	274	Schrei et al., Gear et al. v.	666
Otto et al. v. Schlapkahl et al.	226	Searcy v. Milier.	613
Owens, Harrison v.	314	Shaw v. Kendig.	390
P.		Sheak & Sharra, Dupuy & Howell v.	361
Park, Anderson v.	69	Shickler et al., Richmond v.	483
Parkhurst v. Masteller.	474	Silkknitter, Rix & Stafford v.	262
Pattee Bros. & Co., Warder, Mitchell & Co. v.	515	Slocumb v. The C., B. & Q. R. Co.	675
Peck, Mullen v.	430	Small v. Older.	320
Pennington v. Jones.	37	Smeitzer v. Lombard et al.	204
Perry et al., Barhydt & Co. v.	416	Smith et al., Hamilton et al. v.	15
Phillips, Bennett v.	174	Smith v. Hickenbottom.	733
Pilgrim v. Pilgrim.	370	Smith, Lawrence v.	701
Plumb et al., Taylor & Farley Organ Co. v.	23	Smith & Crittenden et al., American Express Co. v.	242
Plymouth County Agricul- tural Society, Delier v.	481	Spofford et al., Cassady v.	237
Porter, The State v.	601	Stafford v. The City of Oska- loosa.	748
Post, Bolster v.	608	State Center, Incorporated Town of, Tuffree v.	538
Potter et al. v. Worley et al.	66	State v. Allen.	431
Preston, Lufkin & Wilson v.	28	State v. Baldwin.	206
Price & Co., Aldrich v.	151	State v. Brown.	759
R.		State v. Conneham.	351
Rawson et al., Valentine v.	179	State v. Dumond.	333
Reddington, Jewell v.	92	State v. Eshleman.	759
Reed v. The C., R. I. & P. R. Co.	23	State v. Hamilton.	596
Reusch et al. v. The C., B. & Q. R. Co.	687	State v. Jay.	164
Rice v. Kelso.	115	State v. Kelly.	644
Richart, The State v.	245	State v. Knowles.	669
Richmond v. Shickler et al.	486	State v. Krewsen.	558
		State v. Lucas.	501
		State v. Miller.	758
		State v. Porter.	691
		State v. Richart.	245
		State v. Vail.	103
		State v. Weaver.	730
		Strother & Conklin et al., Eas- ton v.	506
		Sweet v. Wright & Spencer et al.	510

CASES REPORTED.

T.

	PAGE.
Taylor et al., Henry et al. v ..	72
Taylor et al., Wendling v.....	354
Taylor & Farley Organ Co. v.	
Plumb et al.	33
Thayer v. Coldren et al.	110
Thomas v. Desney	58
Thompson v. French.....	550
Thorpe Bros. & Co. v. Fowler	
et al.	541
Tiffany v. Henderson	490
Tracy v. Newton et al.	210
Traer et al., Clews v	459
Truesdell v Green et al.	215
Tuffree v. The Incorporated	
Town of State Center.....	538
Turner & Co. v. Woodbury	
Co.	440
Tuttle v. Wheaton et al.	304

U.

**University of Des Moines v.
Livingston..... 307**

V.

Vail, The State v. 103
Valentine v. Rawson et al. 179

W.

PAGE

	PAGE
Warder, Mitchell & Co. v. Pattee Bros. & Co.	515
Weaver, The State v.	730
Webb et al. v. Holt et al.	712
Weir v. Day.	84
Wellington v. Hyler	413
Wells et al. v. Wells et al.	410
Wells, Murray v.	28
Welty, Chase v.	230
Wendling v. Taylor et al.	354
Wetmore v. McMillan et al.	344
Wharton v. Wharton.	698
Wheaton et al., Tuttle v.	304
Wilcox v. Jackson.	278
Wilkins v. The Germania Fire Insurance Co.	529
Willett, Malli v.	705
Wilson, Blair et al. v.	177
Wilson et al., Austin v.	586
Wilson v. Irish.	184
Winkleman, Crispin v.	523
Witt, Guardian, v. Mewhirther.	545
Woodbury County, McFaul v.	99
Woodbury County, Turner & Co. v.	440
Woodman v. Dutton.	442
Worley et al., Potter et al. v.	66
Wright & Spencer et al., Sweet v.	510

Y.

Young v. McWaid 101

REPORTS
 OF
 Cases in Law and Equity,
 ARGUED AND DETERMINED IN THE
 SUPREME COURT
 OF
 THE STATE OF IOWA,
 DES MOINES, DECEMBER TERM, A. D. 1881.

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128	276

IN THE THIRTY-FIFTH YEAR OF THE STATE.

PRESENT:

HON. AUSTIN ADAMS, CHIEF JUSTICE,	
" WILLIAM H. SEEVERS,	} JUDGES.
" JAMES G. DAY,	
" JAMES H. ROTHROCK,	
" JOSEPH M. BECK,	

LONG V. EMSLEY ET AL.

1. **Township Clerk: PUBLIC FUNDS: ACTION FOR.** A township clerk may maintain an action to recover public funds in the hands of third persons.
2. —: —: **DEPOSIT OF.** Where a township clerk deposits public funds in a bank in his individual name, it amounts to a conversion, and the funds become his individual property.
3. —: —: **GARNISHMENT OF.** Public funds deposited by a township clerk in his individual name, are liable to the process of garnishment, and when paid over, before notice to the judgment creditor, cannot be recovered by the clerk.

Long v. Emsley.

4. —: EXEMPLARY DAMAGES. In such case, even if the attaching creditor knew the funds were public funds and not the individual fund of the clerk, he would not be liable to exemplary damages.

Appeal from Cerro Gordo Circuit Court.

SATURDAY, OCTOBER 22.

THE defendants are bankers, and as such had on deposit public money collected by the county treasurer. The plaintiff was township clerk, and said treasurer gave a check payable to the plaintiff in his individual capacity. The money in fact belonged to the township of which defendant was clerk. The check was paid by plaintiffs and the money deposited in the bank of Kirk Bros. to the individual credit of the plaintiff. Kirk Bros. had no notice the money belonged to the township. The defendants on the day the deposit was made obtained knowledge of such fact and acting for others caused Kirk Bros. to be garnished as the debtors of the plaintiff individually. Such proceedings were had that judgment was rendered against Kirk Bros. as garnishees and they paid the judgment to the defendants who were authorized to receive it. This action is brought to recover said money. In addition to which the plaintiff sought to recover exemplary damages. Trial by jury, verdict and judgment for the plaintiff, but both parties appeal. The defendants, however, first appealed.

Miller & Cleggett, for appellants.

Weber & Sherwin, for appellee.

SEEVERS, J.—I. The amount of money paid on the judgment against Kirk Bros. was less than one hundred dollars, but judgment was asked for one hundred and fifty dollars and exemplary damages. It seems, therefore, the amount in controversy, as shown by the pleadings, is more than one hundred dollars. The Circuit Court, however, doubted whether this

Long v. Emsley.

was so, and has certified certain questions under the statute upon which it is said to be desirable to have the opinion of the Supreme Court. As such questions fairly and fully present matters which, when determined, are decisive of this appeal, we shall regard them as presenting the errors relied on without regard to the question whether the certificate was essential to give this court jurisdiction.

We are asked whether "a township clerk can prosecute an action to recover public money, such as road funds, belonging to his township, in the hands of third parties."

1. TOWNSHIP
clerk : pub-
lic funds :
action for.

This question under the circumstances before stated must be answered in the affirmative. The plaintiff claims to have been illegally deprived of the money and he is entitled to the same in his official capacity, and we think he can maintain an action therefor in such capacity.

II. We are asked whether:

"When a township clerk has received public money of the township in his capacity of clerk, and has deposited the money with a bank or banker, in his individual name, as a general deposit, without disclosing the fact that the money was a public fund, but without adding or mixing it with his individual money, does the money in law, as to third parties without notice, remain a public fund; or has it become the individual property of the township clerk?"

We think the money becomes the individual property of the person making the deposit. *Lowry v. Polk County*, 51 Iowa, 50; *School District in Geeneville v. First National Bank*, 102 Mass., 174. In this last case the facts were much like those in the case before us. The essential difference being that the bank in which the deposit was made, appropriated the money without legal process in payment of the individual debt of the person making the deposit. By whom the money is seized cannot make any difference. The essential fact is to whom did the money belong after it was deposited. That it

Long v. Emsley.

belonged to Kirk Bros. and that the relation of debtor and creditor existed between them and the plaintiff as an individual was expressly held in *Lowry v. Polk County*, before cited. There is no statute authorizing the township clerk to deposit public money in a bank, and when he does so, such deposit, as between him and the township, amounts to a conversion.

III. We are further asked:

"In such case if the moneys deposited with the bank or banker, are held to be still public funds, are they subject to be ^{3. — : — : attached by garnishment on execution in favor of} _{garnishment} ^{of.} a creditor, who has no notice at the time that they are public funds?"

As it has been held the funds after they have been deposited, are the individual property of the banker, and the relation of debtor and creditor existed between him and the person making the deposit. Such funds are liable to be seized by the process of garnishment. We are also asked:

"In such case if after the service of the process on the bank as garnishee, and after judgment is rendered against the garnishee, and the money paid and credited on the judgment against the township clerk individually, without notice to the township clerk, the judgment creditor receives notice that the funds attached were public funds, can they be recovered in an action brought by the township clerk against the judgment creditor, or his agent, who received the money?"

The only difference between this and the foregoing question is that after the money has been paid to the creditor he is notified it belongs to the township. This question must be answered in the negative. Expenses had been incurred by the creditor before he was so notified and we do not think the plaintiff can be permitted to recover of his creditor, money which has been lawfully paid to him.

IV. The last question certified is as follows:

"In such case if the judgment creditor, at or before the

Hamilton v. Smith.

time he attached the funds, knew that they were public funds and not individual funds of the township clerk, would he be liable to exemplary damages."

This question must have been certified in the interest of the plaintiff as the court set aside so much of the verdict as gave him exemplary damages. This question must, we think, be answered in the negative. If the creditor did know the funds belonged to the township he would not be liable to exemplary damages. This question of course is predicated upon the fact the creditor knew public money had been deposited to the individual credit of the plaintiff. Now whether it was liable to be seized by the creditor by the process of garnishment is a purely legal question, and if the creditor should incorrectly determine the same, malice could not be predicated on or because of such determination. On plaintiff's appeal the judgment is affirmed, and on defendant's

REVERSED.

HAMILTON ET AL. V. SMITH ET AL.

1. **Conveyance: DURESS.** Where the evidence shows the conveyance was an intelligent, voluntary act, the facts that the deed was executed reluctantly, and after some threats had been made, are insufficient to establish undue influence or duress.
2. ———: **ANTE NUPTIAL: FRAUD.** A conveyance to children just prior to, and in contemplation of a second marriage, and without the knowledge of the wife will not be construed as a fraud on the rights of the wife.
3. ———: **UNRECORDED: NOTICE OF.** To constitute a valid notice of a prior unrecorded deed, it is not necessary the party should be satisfied of the truthfulness of the matters contained in such notice.

Appeal from Warren District Court.

SATURDAY, OCTOBER 22.

THIS action was brought against the defendant Barbara Smith to quiet title to forty acres of land in Warren county. After-

57	15
134	79
134	80
134	81
57	15
137	171

Hamilton v. Smith.

wards her husband, John Smith, filed a petition in intervention to set aside a conveyance made by him to the plaintiffs of one hundred and twenty acres of land in Marion county. The defendant, Barbara, in answer to the plaintiffs' petition admits that she claims an interest in the land in Warren county, as the plaintiffs aver. She says that she is the owner of the land by purchase from her husband who was before that time the owner, and while she admits that her husband executed a deed of the land to the plaintiffs before the conveyance to her, yet she says that her rights are paramount, because in the first place, the deed to them was obtained by undue influence and duress, and in fraud of her rights, and in the second place, was not filed for record at the time of her purchase, and she purchased the land and paid a valuable consideration for it, without notice, actual or constructive, of the plaintiffs' deed. The court rendered a decree setting aside the conveyance to the plaintiffs, both as to the land in Warren county and the land in Marion county. The plaintiffs appeal.

McNeil and Stone, Ayres & Co., for appellants.

Henderson & Berry, for appellees.

ADAMS, CH. J.—The undisputed facts of the case are substantially as follows: In November, 1873, the intervenor, John Smith, was the owner of the land in controversy. He was a widower, and a little more than sixty years of age. He had three children, who are the plaintiffs in this action. On the 7th of November, 1863, he conveyed the land in controversy to the plaintiffs, reserving to himself a life estate therein. Four days afterward he was married to the defendant, Barbara. The conveyance to the plaintiffs was made by him after his engagement to her, and in contemplation of the marriage. The plaintiffs filed their deed for record in Marion county where one hundred and twenty acres of the land were situated, but failed to file it in Warren county where the forty acres were

situated. They never favored the marriage between their father and Barbara, and the want of harmony which existed from the first became more and more manifest, and occasionally resulted in open quarrels. In March, 1876, the father, discovering that the deed to his children had never been filed for record in Warren county, executed a deed of the land in that county to his wife, and she upon the same day filed the same for record. The plaintiffs' deed was filed in Warren county more than two years later. The plaintiffs having been informed of the claims and pretenses of their step-mother in regard to the land brought this action to quiet their title.

The plaintiffs moved to strike the petition for intervention from the files on the ground that it related to land in regard

1. CONVEY-
ANCE : du-
ress.

to which the plaintiffs had tendered no issue. The motion was overruled, and the plaintiffs excepted.

In the view which we take of the case we do not need to determine the question presented by the exception. A somewhat broader question lies in our pathway, the determination of which, according to the view which we have taken will dispose of the intervenor's claim. He assails the validity of his deed to his children. As the validity of the same deed is drawn in question by the defendant, Barbara, as affecting the forty acres which she claims, we cannot evade its determination.

It is said that this deed was obtained by undue influence and duress. But, in our opinion, the evidence does not so show. It does show, it is true, that the intervenor executed it with great reluctance, and not without very persistent endeavors on the part of the grantees to induce him to do so. But there is no evidence that he was not in full possession of his powers and abundantly able to control his affairs in his own way. Not only so, but he sought the advice of eminent legal counsel, and was told by them that he was under no obligation to make the deed, unless he desired to. The pretense that he executed it under duress is, in our opinion, equally

 Hamilton v. Smith.

groundless. He testifies himself to some threats of violence made by his children, but according to the great preponderance of the testimony, no such threats were made as amounted to duress. In our opinion the execution of the deed was an intelligent and voluntary act, done with the view of making what seemed to the intervenor at the time a proper disposition of the land.

A much closer question is presented in determining whether the deed can be sustained as against the defendant, Barbara, ² — : an- the grantor's wife. It was made without her ^{te nuptial :} knowledge, upon the eve of marriage, and in con- ^{fraud.} templation of it. It has been frequently held that secret and voluntary conveyances made by a woman in contemplation of marriage are liable to be set aside upon the husband's application as a fraud upon his marital rights. *Tucker v. Andrews*, 13 Me., 124; *Jordan v. Black*, Meigs (Tenn.), 142; *Logan v. Simmons*, 3 Ired. Eq., 487; *Williams v. Carle*, 2 Stockt., 543; *Freeman v. Hartman*, 45 Ill., 57; *Carleton v. Earl of Dorset*, 2 Vern., 17; *St. George v. Wake*, 1 Myl. and K., 610. A corresponding rule as to fraud would doubtless apply to a husband who before marriage had made a secret transfer of his property which resulted in an injury to his wife. *Lench v. Duvall*, 8 Bush, 201; *Gainor v. Gainor*, 26 Iowa, 337; Schouler on Domestic Relations, 271. But it is said that in all such cases the question is as to whether the evidence is sufficient to show fraud. *Strathmore v. Bowes*, 1 Ves., Jr., 28. The secrecy of the conveyance would not necessarily show fraud. *Taylor v. Pugh*, 1 Hare, 613. And in 2 Kent's Com., 175, the author says: "If the settlement be upon the children of a former husband, the settlement would be valid without notice." Citing *King v. Colton*, 2 P. Wms., 674; *Jones v. Cole*, 2 Bailey Eq., 330. In the case at bar the settlement was made by the husband upon the children of a former wife. The fact that the settlement was made upon the very persons to whom the property would have descended, if their father had

 Hamilton v. Smith.

died seized of the property, and intestate, and without a second marriage, constitutes a most important consideration. We can conceive that it may have been made with the profoundest desire to properly respect what seemed to him to be the claims of his children upon the one hand, and his intended wife upon the other. What other property he had the evidence does not show. That he had other property seems to be conceded. He proceeded immediately after marriage to make a will, which we infer was favorable to his wife. And in the very conveyance to the plaintiffs he reserved to himself a life estate, which, it must be deemed, would inure to her benefit during his life. In view then of the whole case as it is shown to us, we are not prepared to say that any fraud was intended, or that the law will necessarily construe what is shown to have been done as a fraud. If any imposition had been practiced upon her prior to the marriage by representations made by the husband respecting his property, the case might be different, but the evidence shows affirmatively that no representations concerning his property were made.

The defendant, Barbara's, claim that she is a purchaser for value, without notice, presents an independent question. If a. —: un-
recorded
notice of. she is such purchaser, of course her claim to the property must be sustained. But in our opinion, she is not. To say nothing of the want of evidence of payment of a consideration, we think it very clearly appears that she had notice. She did not, it is true, see the deed, but she admits that she was told by the grantees themselves that they had such deed. She claims that this did not constitute notice, because she did not believe their statement. But it is not necessary to constitute a valid notice that the party notified be satisfied of the truth of the matter contained in the notice.

In our opinion, the decree of the District Court must be

REVERSED.

KOWS V. MOWERY.

1. **Administrator: FINAL SETTLEMENT: FRAUD.** The final settlement and discharge of an administrator is an adjudication binding upon all persons in interest, unless impeached for fraud or mistake.
2. **Pleading: STATUTE OF LIMITATIONS.** Under the allegations of the petition, which do not charge fraud or set forth the fraudulent acts complained of, the court might properly have held this was a proceeding to open the settlement under section 2475, Code, and was barred after three months.

Appeal from Jefferson Circuit Court.

SATURDAY, OCTOBER 22.

THIS action was commenced on the 30th day of April, 1880. The plaintiff claims of the defendant the sum of fourteen thousand dollars. There was a demurrer to the petition which was sustained. Plaintiff appeals.

D. P. Stubbs, for appellant.

Slagle, Acheson & McCracken, for appellee.

ROTHROCK, J.—As the cause was disposed of upon demurrer to the petition, it will be necessary to set out the allegations therein contained. The petition is as follows: Plaintiff for cause of action “shows that he is the illegitimate son of James M. Wright, who died about the 27th day of February, 1870, leaving defendant as his widow, and plaintiff as his sole heir; that said deceased in his lifetime generally and notoriously acknowledged plaintiff as his son and heir, and also acknowledged him as his son in writing.

“That on the tenth day of July, 1873, defendant took out letters of administration and became the duly qualified administratrix of the deceased, and took and held possession of all the effects of deceased, consisting of personal property, which petitioner avers amounted to fourteen thousand dollars; that she never returned any inventory of the property and effects

57	30
105	572

57	20
110	549

57	20
122	11

57	20
138	678

Kows v. Mowery.

of deceased, nor charged herself therewith; but merely charged herself with the worthless effects.

"And, that on the thirtieth day of March, 1875, she made final settlement with the court; and obtained her discharge without any notice to plaintiff (he having no knowledge thereof); showing nothing in her hands; and that about the same time she removed from the State of Iowa to the State of Kentucky; and remained a non-resident of this State until March, 1878, when she again became a resident of this State.

"Plaintiff attained his majority on the —day of February, 1876; and defendant well knowing that he is, and was the son and heir of James M. Wright, deceased; and, though on the fifteenth day of March, 1880, demand was made on her to pay the amount due plaintiff and execute the trust imposed; she still keeps and holds said funds; and refuses to make settlement and showing as to the amount due plaintiff; and praying that the final settlement of defendant, administratrix, be declared fraudulent and void; that she be required to make a full statement and settlement, showing the assets in her hands; that he may be decreed to be the sole and rightful heir of the said James M. Wright, deceased; that he have decree and judgment against defendant for the amount due him from the said estate, with interest and such other relief," etc.

The demurrer was to the effect that the proceeding was barred by the statute of limitations.

It appears from the petition that the defendant made a final settlement with the court, and was discharged. This settlement and discharge is an adjudication and binding upon the parties in interest unless it may be impeached for fraud or mistake. *Cowins v. Tol.*, 36 Iowa, 82; *Patterson v. Bell*, 25 Id., 149. Section 2475 of the Code, provides, that accounts settled in the absence of any person adversely interested, and without notice to him, may be opened within three months, on his application. There is no doubt, if the allegations of the petition as

1. ADMINIS-
TRATOR: fi-
nal settle-
ment: fraud.

 Kows v. Mowery.

to the heirship of the plaintiff are true, he had the right within three months to open up the settlement. The settlement as to him, he being absent and having no notice thereof was only provisional, and he could have opened it even though the defendant had removed from the State. Sections 2479-80-81. No reason is given in this petition why this application was not made. Section 2474 provides, that mistakes in settlements may be corrected after final settlement on showing such grounds for relief in equity as will justify the interference of the court. It is not averred in the petition that the settlement was made and the plaintiff cut off from his large inheritance by the mistake of the defendant. It is contended by counsel for the appellant that the settlement was fraudulent and that plaintiff is entitled to relief on that ground. Whether this be correct or not we need not determine, because this petition does not charge fraud. It is true, in the prayer of the petition, it is asked that the final settlement be declared fraudulent. It is not charged in the petition that the defendant, when she neglected to return an inventory of the assets of the estate, knew the plaintiff was an heir of her deceased husband, nor that she had such knowledge when the settlement was made.

We do not intend to determine more than there is in the record before us, and in conclusion we deem it sufficient to say that before the plaintiff is entitled to raise the question as to whether the settlement and adjudication may be impeached for fraud, he must show by the allegations of his petition, sufficient reasons for not availing himself of the provisions of the statute for opening up the settlement, and if he claims this to be an original action in equity for relief on the ground of fraud, he must set forth the fraudulent acts of which he complains and show how he was deceived and misled thereby. Under the allegations of this petition, we think

A. PLEADING:
statute of
limitation.

 Reed v. The C., R. I. & P. R. Co.

the court may properly have held that this was a mere proceeding to open the settlement by one not present and without notice, and that it was barred by section 2475 of the Code.

AFFIRMED.

REED v. C., R. I. & P. R. Co.

1. **Practice: EVIDENCE: ADMISSION OF.** Where certain evidence was ruled out, but afterward the same in substance was admitted, it was held, in error, to be without prejudice.
2. ———: **INSTRUCTIONS.** If the true meaning of the instructions was sufficiently plain, and could not have been misunderstood by the jury, there was no error.
3. **Railroads: PERSONAL INJURIES: MEDICAL ATTENDANCE.** To recover for medical attendance and medicines, in actions for personal injuries, the value thereof must be established by proof; and where no value is shown, an instruction including reasonable compensation therefor, is erroneous.

Appeal from Mahaska District Court.

SATURDAY, OCTOBER 22.

ACTION to recover for personal injuries sustained by plaintiff while in the employment of defendant, by reason of the negligence of his co-employee. There was a verdict and judgment for plaintiff. Defendant appeals.

M. E. Cutts, for appellant.

John T. Lacy, for appellee.

BECK, J.—I. Plaintiff was acting as a brakeman of a train operated upon defendant's railroad, and while endeavoring to couple the engine to a part of a train, one of his fingers was injured. He claims the injury was caused by the fireman's negligence, who was in charge of the engine, in moving it without a warning or signal to plaintiff.

57	23
83	644
57	23
106	547
57	23
108	636
108	636
57	23
116	19

 Reed v. The C., R. I. & P. R. Co.

It was shown that plaintiff was not employed by any of the officers of defendant and was only temporarily serving in the place of the regular brakeman, who, for some reason, was unable to be upon the train. But it appears that plaintiff was required to perform temporarily the services of the regular brakeman and did enter upon them with the knowledge and consent of the conductor, who was authorized, under the rules of defendant, in case of the disability of a brakeman, to supply his place by the temporary employment of a proper person.

II. Upon the trial the conductor was asked if he hired the plaintiff, and under what arrangements between him and the conductor he was to work. Upon the objection of
 1. PRACTICE: evidence: admission of. plaintiff the court held that the question was incompetent. The ruling is complained of as being erroneous. Without determining as to the materiality or competency of the evidence sought to be elicited, we are of the opinion that the error in the ruling, if there be any, was cured by the testimony of the conductor, immediately given, to the effect that plaintiff did no work by reason of any arrangement between plaintiff and witness. This testimony went to the jury and it was just what defendant sought to elicit by the question held to be improper. The evidence desired was, therefore, before the jury, and defendant received its full benefit. No prejudice, therefore, resulted from the ruling under consideration.

III. The court gave numerous instructions applicable to the issues and facts developed upon the trial and refused a number
 2. ———: instructions. asked for by defendant. We are inclined to think, but we do not so decide, that the instructions given with but one exception were correct, and that those refused ought not to have been given. It would be unprofitable to reply to the ingenious criticism of the language of the instructions by which those given are assailed and those refused supported by the argument of defendant's counsel. The true meaning of the instructions given is, we think, sufficiently plain and could not have been misunderstood by the jury.

 Reed v. The C., R. I. & P. R. Co.

Those refused were in conflict with or presented rules embraced in those given. There was no error in withholding them.

IV. The court directed the jury that if they found that plaintiff was entitled to recover, they should among other damages allow for "expenses reasonably incurred for medical care and attention." Of course upon proper evidence showing the amount, or proximate amount, of these expenses, plaintiff would be entitled to recover them. But there is not one word in the evidence upon which an estimate can be based of their amount. The testimony shows that plaintiff was treated by a physician three or four times and that he procured medicine for his injuries. The value of these medical services and medicines are not attempted to be shown in any manner and their extent and character are no more definitely shown in the testimony than in the statement we have just made. Under the instruction in question the jury were directed to include compensation for medical services in their verdict. They doubtless would feel authorized to determine the amount to be allowed therefor according to their own judgment without aid of evidence. But the law cannot be administered in this uncertain way. Damages of this kind cannot be found by the jury except upon proof. It will not do to say that the amount of damages allowed by the jury may have been small. We can know nothing about the amount and if we could know it to be insignificant, we could not relieve this case from the operation of the familiar rules of law which require damages of the character of those under consideration to be established by proof. For the error pointed out the judgment of the District Court must be

2. RAIL-
ROADS: per-
sonal inter-
ests: medical
attendance.

REVEREND

Murray v. Wells.

MURRAY V. WELLS.

1. **Practice in Supreme Court:** JUDGMENT: EVIDENCE TO SUPPORT. A judgment will not be reversed for want of evidence to support it, unless there is such absence of proof as to authorize the conclusion that the judgment was the result of passion or prejudice.
2. ———: **ERROR WITHOUT PREJUDICE.** A judgment will not be disturbed for an error in the admission of testimony that works no prejudice.

Appeal from Jefferson Circuit Court.

SATURDAY, OCTOBER 22.

ACTION upon an account. The defendant in her answer denies that she is indebted to plaintiff upon the account in any sum, and alleges that a part of it is for a debt of another, for which she is not liable. The cause was tried to the court without a jury and judgment was rendered for plaintiff. Defendant appeals.

Culbertson & Jones, for appellant.*Slagle & McCrackin*, for appellee.

BECK, J.—The evidence discloses that plaintiff is the assignee of Wells, Stever & Averill, appointed subsequently to the death of Wells; that defendant is the widow of Wells, and that the account is for goods obtained by her from the firm after his death and before the appointment of the assignee, and for goods furnished to one Stoneburner, and charged to her. Defendant insists that the goods were not obtained by her upon her own account, but should be charged to the account of her deceased husband, one of the co-partners of the firm of Wells, Stever & Averill, and that she never assumed the payment for the goods sold to Stoneburner.

II. Defendant insists: 1. That the judgment is not supported by the evidence. Six out of seven errors assigned are directed to this objection. 2. That the court erred in admitting in evidence the books of account of the firm. This objection is raised by the first error assigned. The objection that the judgment is not

1. PRACTICE
in supreme
court: judg-
ment: evi-
dence to sup-
port.

Murray v. Wells.

supported by the evidence is disposed of upon the ground that the evidence is conflicting. Plaintiff's testimony tended to show that the goods obtained by defendant were purchased on her own account, and charged to her with her assent, and under her direction. The goods sold to Stoneburner, plaintiff's evidence also tends to show, were with defendant's assent and knowledge, and upon her request charged to her. Defendant, by her own testimony, contradicts plaintiff's evidence upon these points. The evidence being conflicting we cannot disturb the judgment of the Circuit Court. To authorize us to reverse the judgment on the ground of want of evidence for its support, there must be such absence of proof as to authorize the conclusion that the decision of the Circuit Court was the result of passion or prejudice. Nothing of the kind can be claimed in this case. Decisions to this effect are numerous and found in every volume of our reports. They need not be here recited.

III. The defendant insists that the court erred in admitting the books of the firm in evidence. It does not clearly appear from the abstract that these books were admitted. But if it be conceded that they were admitted, and that their admission was erroneous, it clearly appears that the error was without prejudice, for defendant in her own testimony admits the items of the account charged against her to be correct. The books tend to establish no other facts. Defendant, by her own testimony, shows conclusively that no possible prejudice could have resulted to her from the admission of the books. We do not disturb judgments for errors that work no prejudice.

No other questions are presented in the case.

AFFIRMED.

Luffin & Wilson v. Preston.

LUFFIN & WILSON V. PRESTON.

1. **Replevin: ASSIGNMENT OF LEASE.** The assignment of a lease, in good faith, by one who has neither the possession nor right of possession of the crops, invests the assignee with all the interest the assignor has thereunder, and is valid as against creditors and purchasers of the assignor, without notice, and will enable the assignee to maintain replevin against them to recover such interest.

Appeal from Jasper Circuit Court.

SATURDAY, OCTOBER 22.

ACTION of replevin for 850 bushels of corn. The cause was referred to a referee who made certain written findings of fact and recommended that a judgment be entered for the defendant, which was accordingly done. Plaintiffs appeal.

Ryan Bros., for appellant.

Haines & Lyman and S. C. Cook, for appellee.

ROTHROCK, J.—On a former appeal in this case the facts as to the claims made by the parties to the property in controversy are fully stated, and therefore need not be repeated here. See 52 Iowa, 235. The referee found as facts that the leases were assigned by Morris, the lessor, to the plaintiffs on account of certain indebtedness due from the former to the latter, and as collateral security for said indebtedness. That while the assignments were absolute and unqualified no amount was fixed as the value of the leases. It was further found that the defendant had no notice of such assignment until after the sale of the crop on execution against Morris, and as a conclusion of law it was found that as no change of the possession of the property occurred, the assignments were of no validity as against the defendant.

In the former appeal the question was made as to the right of the plaintiffs to prove that the defendant had notice that

57	28
78	236
57	28
98	14

Lufkin & Wilson v. Preston.

the plaintiffs were the owners of the corn, and we held that the court erred in excluding the evidence. As we remember no question was then made as to the necessity of showing notice to the defendant under the facts of the case, and the point being one of minor importance, as the case was then presented, it was assumed that such notice was necessary. It is now urged that as Morris, the lessor, did not have either the possession or the right of possession of the crops the assignments of the leases were valid as to creditors and purchasers without notice. This position is unquestionably correct. *Thomas v. Hillhouse*, 17 Iowa, 67; *Sansee v. Wilson*, Id., 582; *Case & Co. v. Burrows*, 54 Id., 679; *Manny v. Adams*, 32 Id., 165. The fact that the plaintiff took the assignments as collateral security upon a debt can make no difference in their title to the corn. The assignments were made in good faith and invested the plaintiff with all the interest Morris had, and in our opinion, this was sufficient to enable them to maintain replevin against the defendant who had no paramount right.

No question is made upon this appeal as to the correctness of the findings of fact made by the referee. Exception is only taken to the conclusions of law. We think that under the facts found the plaintiffs were entitled to a judgment for \$119, the value of the corn, as shown by the agreement of the parties. The judgment will be reversed and the cause remanded for judgment in harmony with this opinion.

REVERSED.

RYAN V. ADAMSON ET AL.

1. **Insurance: MORTGAGE: SUBROGATION.** A mortgagee has no interest in a policy of insurance issued to the mortgagor for his own benefit. Under the facts in this case, *held*, that the mortgagee could not be subrogated to the rights of the mortgagor under the policy of insurance.

Appeal from Jasper Circuit Court.

SATURDAY, OCTOBER 22.

ACTION in chancery to foreclose a mortgage. The Circuit Court sustained a demurrer to the petition filed by the assurance company, and plaintiff electing to stand on his petition, it was dismissed. From this decision he appeals.

Ryan Bros., for appellants.

Smith & Wilson, for appellees.

BECK, J —I. The petition alleges that one Ketcham executed a mortgage upon a town lot to secure plaintiff, his grantor, the payment of the purchase-money due him; that after the purchase of the lot, Ketcham built a house upon it, and subsequently sold the property to Adamson, who agreed to pay plaintiff the purchase-money due him; that Adamson, after he purchased the property, caused the house thereon to be insured by a policy issued by the Western Assurance Co., which is made a defendant to this action; that the building has been destroyed by fire; that the property since the destruction of the house is not equal in value to the amount of plaintiff's claim; and that Ketcham is insolvent. The petition prays for a foreclosure of the mortgage against Ketcham and Adamson and that plaintiff may be subrogated to the rights of Adamson under the policy, and that a judgment be rendered against the insurance company for the amount due plaintiff upon the mortgage. The insurance company demurred to the petition on the ground that the facts alleged fail to show any ground

 Ryan v. Adamson.

for the relief demanded under the policy. The demurrer was sustained. Judgment was rendered against Ketcham, and the case continued as to Adamson.

II. The sole question presented in the case is this: Do the facts show that plaintiff is entitled to recover the money due upon the policy of insurance? The petition does not show privity between the plaintiff and insurance company; nor does it show an assignment or transfer to plaintiff in any form of the policy, or Adamson's interest in it. Plaintiff is not shown to be subrogated by contract to the rights of the insured. Nor can he be so subrogated by reason of any equity arising in the case. His security is just as valuable now as when the mortgage was executed, for the house insured was not in existence when the mortgage was executed. It is not shown that Adamson, who, it is alleged, assumed to pay the debt secured by the mortgage is insolvent. Nor is it claimed that either Adamson or Ketcham undertook to add to plaintiff's security by insuring the property for his benefit. There are no facts alleged upon which equity will support plaintiff's claim to be subrogated to the rights of the assured.

We know of no rule of law or equity under which plaintiff is entitled to the relief prayed for in the petition. This case cannot be excepted from the rule that a mortgagee has no interest in a policy of insurance issued to the mortgagor for his own benefit. Adamson is to be regarded as the mortgagor for he stands in the mortgagor's shoes. In support of the rule just stated see *Columbia Ins. Co. v. Lawrence*, 10 Pet., 507; *McDonald v. Black*, 20 Ohio, 185; *Carter v. Rocket and the N. Y. Fire Ins. Co.*, 8 Paige Chy., 436. Other cases recognizing the doctrine need not be here cited. We think it is nowhere disputed.

The demurrer was rightly sustained.

AFFIRMED.

Johnson v. Barker.

JOHNSON V. BARKER.

1. **Executor: NOTICE OF APPOINTMENT.** The statute, Sec. 2366, Code, is directory. The failure by a person appointed executor, to give notice of his appointment, as provided by statute, will not operate to annul the appointment or prevent him from discharging the duties pertaining thereto.

Appeal from Delaware Circuit Court

SATURDAY, OCTOBER 22.

ACTION on certain notes and an account against the defendant as administrator of Robert Hogg, deceased.

There was a demurrer to the petition on the ground that the cause of action was barred by the statute of limitations. The demurrer was sustained and plaintiff appeals.

Herrick & Doael and *J. B. Powers*, for appellant.

Dooley & Perkins, for appellee.

SEEVERS, J.—“Executors and administrators first appointed and qualified * * shall within ten days after the receipt of their letters publish such notice of their appointment as the court or clerk may direct.”
1. EXECUTORS notice of appointment.
 Code. § 2366.

All claims not filed and proved within twelve months after giving the notice aforesaid are barred unless * * “peculiar circumstances entitle the claimant to equitable relief.” Counsel for the appellant insist such peculiar circumstances were stated in the petition. This question we find it unnecessary to determine because counsel make the further point that it does not appear on the face of the petition the notice required by the statute was given.

One I. H. Hogg was first appointed executor of the estate and we fail to find any statement in the record that he gave any notice of his appointment, or that the defendant gave no-

Taylor & Farley Organ Company v. Plumb.

tice of his appointment. The only allegation in the petition on which counsel for the appellee relies is the following: "Plaintiff further states that on or about the first day of September, 1877, said Robert Hogg died testate and by his last will and testament appointed I. H. Hogg executor, who duly qualified and entered upon his duties as such, and remained such executor until the January term, 1880, of said Circuit Court, when his letters were revoked."

A person may be appointed executor, qualify and enter upon the discharge of his duties and yet never give the notice which the statute contemplates shall follow the issue of the letters and qualification. The statute is directory and the omission to give the notice does not have the effect to annul the appointment or prevent the incumbent from discharging the duties pertaining thereto.

REVERSED.

TAYLOR & FARLEY ORGAN CO. v. PLUMB ET AL.

1. **Justice of the Peace: JUDGMENT IN REM: RE-TRIAL.** A judgment *in rem* of a justice's court, entered upon service by publication, and without appearance by defendant, may be set aside, and the cause retried, upon proper application made within two years, under section 2877, Code. Section 3543, Code, is only applicable in cases of personal service.

Appeal from Sioux Circuit Court.

SATURDAY, OCTOBER 22.

In June, 1877, the defendant, Plumb, commenced an action by attachment against the plaintiff before a justice of the peace, to recover \$87. The ground of the attachment was that the plaintiff herein was a foreign corporation. There was no personal service made upon appellant, but service of the original notice was made by publication. The attachment was served by the garnishment of a third party, who was indebted

Taylor & Farley Organ Company v. Plumb.

to appellant. The garnishee answered, and under the order of the justice paid his indebtedness into the justice's court. Appellant, having no actual notice of the pendency of the action, was defaulted, and judgment was rendered in favor of said Plumb, and the money paid over by the garnishee was paid to Plumb in satisfaction of the judgment. The defendant, Beach, as surety, joined in the execution of the attachment bond made necessary by the proceedings.

Within two years after the judgment was rendered appellant appeared and filed a motion before said justice of the peace, asking to have said cause re-tried, and filed a bond for security for costs. The appellant was allowed to make defense, and Plumb having been duly and personally served with notice of the time and place for the hearing of said motion and retrial, the same was heard, and on the re-trial of said cause, the said judgment was set aside and judgment was rendered therein against said Plumb for costs, and an order made that he return to the appellant the money received on said judgment.

This action was brought on the attachment bond to recover the money paid over to Plumb in the attachment suit, and also for damages for fraudulently and maliciously suing out the writ when he knew that appellant was in no manner indebted to him. There was a demurrer to the petition which was sustained. Plaintiff elected to stand upon the petition, and appeals from the ruling on the demurrer.

Argo & Kelley, for appellant.

J. H. Swan, for appellee.

ROTHROCK, J.—We do not understand that counsel for appellant claimed that there was any defect of jurisdiction in the justice of the peace in entertaining the action upon service by publication and in subjecting the money attached to the payment of the judgment. The only question which appears to us necessary to be considered is, did

1. JUSTICE of
the peace :
judgment in
rem : re-trial.

the justice of the peace have jurisdiction to grant a re-trial, and order the repayment of the money to the appellant? A determination of this question involves an examination of several sections of the statute, which we will proceed to do. Section 2877 provides that "where a judgment has been rendered upon service by publication only, without the appearance of the defendant, he may at any time within two years appear and move to have the action re-tried, and security for costs being given, he shall be permitted to defend." This provision appears to be applicable to judgments in the District and Circuit Courts. At least it may be said that this section does not of itself authorize a judgment rendered by a justice of the peace upon service by publication to be re-tried within two years. But by section 3516 it is provided that "the parties to the action (before a justice of the peace) may be the same as in the Circuit Court, and all the proceedings prescribed for that court, so far as the same are applicable and not herein changed shall be pursued in justice's court." Now if there is no section of the Code providing for the re-trial of an action before a justice of the peace where service has been had by publication, and the defendant did not appear, it would seem to follow that a re-trial should be allowed within two years under section 2877. If all the proceedings prescribed for the Circuit Court may be had in the justice's court, of course, a motion for a re-trial within the prescribed time may be made, and a re-trial had. Such a proceeding cannot be said to be inapplicable to suits in a justice's court. But it is claimed that section 3543 provides how and in what time all judgments in justice's courts may be set aside. It is in these words: "judgment dismissing the cause, or by default, may be set aside by the justice at any time within six days after being rendered, if the party applying therefor can show a satisfactory excuse."

A careful examination of this provision in connection with the sections before cited, together with the sections of the statute authorizing new trials in the district and Circuit Courts,

Taylor & Farley Organ Company v. Plumb.

when judgments by default are rendered upon personal services, lead us to the conclusion that section 8543 is only applicable when there has been personal service. It will be observed that section 2877 does not designate a judgment on service by publication as a judgment by default. It is not in fact a personal judgment unless there be an appearance. Under that section a party defendant has the right to appear and demand a re-trial without showing any excuse, satisfactory or otherwise. It surely ought not be held that because controversies in justice's courts are less important than in courts of record that what would be regarded as a matter of right in one court should be denied or abridged in another, unless the law so expressly provides. It is true that the manner of acquiring jurisdiction of the property of the defendant upon service by publication differs in the justice's court, but the force and effect of the judgment is the same. If rendered without the appearance of the defendant it is but a judgment *in rem*. *Johnson v. Dodge*, 19 Iowa, 106.

While we are free to admit the question is not devoid of difficulty, we think the construction we adopt is one fairly warranted, and accords more nearly with the law, which aims to do justice and give every person a reasonable opportunity to protect his rights.

REVERSED.

PENNINGTON V. JONES.

1. **Mortgage: OF CROPS NOT PLANTED: INDEFINITE DESCRIPTION.** In this case it was held that the description in the mortgage was indefinite and uncertain, and that before a mortgage on crops to be sown or planted can be regarded as valid, as against third persons, the year or term in which the crops are to be grown must, at least, be stated.

Appeal from Franklin Circuit Court.

SATURDAY, OCTOBER 22.

W. A. McDOWELL executed a chattel-mortgage to the plaintiff. The defendant, as sheriff, as the plaintiff claims, levied upon and sold the mortgaged property under an execution against McDowell. The defendant had constructive notice at the time of the levy, and express notice of the mortgage before the sale. This action was brought to recover damages sustained by the plaintiff. Judgment for the defendant, and plaintiff appeals.

Dow & Gilgar, for appellants.

McKenzie & Hemingway and *Hamman & Church*, for appellee.

SEEVERS, J.—The mortgage was executed on the first day of February, 1879, and the property mortgaged therein was described as follows: "About fifty acres of wheat; twenty acres of oats; also twelve acres of barley, and twenty acres of corn; also two acres of buckwheat, to be sown and raised on the land leased of Barber McDowell, and now occupied by said W. A. McDowell, lying and being in section seventeen (17) in township of Ingham, in said Franklin county, and also one hundred and fifteen Brahma fowls, including their products and increase."

The plaintiff introduced the mortgage, and then gave evidence tending to show the amount due thereon; that McDow-

 Pennington v. Jones.

ell, during the year 1879, and after the mortgage was executed, sowed and planted upon the land described therein fifty acres of wheat, twenty acres of barley, and about thirty acres of corn, about ten acres of which was standing, unhusked, at the time the defendant made the levy, on the nineteenth day of December, 1879; that plaintiff had not taken possession of said crops, and that McDowell was in possession thereof and of the land under a valid lease for the years 1879, 1880, and 1881.

Such being the evidence, the defendant moved the court for judgment, because: First, The chattel-mortgage under which plaintiff claims "is given on crops not in existence, and of which he has never taken possession." Second, "That the description in such mortgage is insufficient and uncertain;" and, Third, "That said mortgage is not a lien on crops which were taken by defendant as alleged." The court sustained the motion, took the case from the jury, and rendered judgment for the defendant.

In *Scharfenburg v. Bishop*, 35 Iowa, 60, it was held a mortgage was valid against third persons which described the property as "including any and all fixtures and
 1. MORTGAGE: upon crops: Indefinite description. stock now or hereafter kept in my said leather business in the city of Keokuk, Lee county, and State of Iowa." Whether crops to be sown or planted come within the rule established in the case just cited, we have no occasion to determine.

In *Fejavary v. Broesch*, 52 Iowa, 88, it was held where there was a lease of a farm for six years, a stipulation therein that rents due, and to become due, under the lease should be a "perpetual lien on any and all the crops raised on the farm * * whether the same be exempt from execution or not," was valid between the parties and could be enforced. The distinction between the cited case and the one at bar is two-fold: *First*, This controversy is not between the mortgagor and mortgagee, but between the latter and a third person. *Second*, In the cited case the mortgage was on all crops grown during the

Hoopes v. Ferguson.

lease, and in the case before us the mortgage does not state the crops were to be grown on the leased premises, or that all the crops to be grown for any specified number of years were mortgaged.

The mortgage was executed in 1879 upon crops to be sown, and planted. The debt became due in December of that year, but the plaintiff did not take possession, and afterwards the levy was made. It is insisted, because of the facts just stated, the defendant was bound to know the crops grown in 1879 were mortgaged, but we think, as the plaintiff did not take possession, the defendant could just as well conclude the mortgage covered the crops grown in 1880 or 1881 as those of 1879.

The mortgage was therefore indefinite and uncertain, and we think the better rule is that before a mortgage on crops to be sown or planted can be regarded as valid as against third persons, the year or term the crops are to be grown must be stated. This much, at least, should be required, and whether it would be sufficient is not determined in this case.

AFFIRMED.

HOOPES V. FERGUSON.

1. **Usury: PAYMENT IN FULL: NEW CONTRACT.** The original indebtedness cannot be revived after it is once paid in full and discharged. The new contract, though figured on the basis of the original indebtedness, is not usurious, when not a device to cover usury.

Appeal from Dallas Circuit Court.

SATURDAY, OCTOBER 22.

ACTION upon a promissory note for \$26. The action was originally brought before a justice of the peace. The defendant for answer averred that the note was given for interest on money borrowed and was wholly usurious. The plaintiff re-

Hoopes v. Ferguson.

covered, but upon an appeal being taken to the Circuit Court judgment was rendered against her and in favor of the defendant for costs. She now appeals.

Cole & Cole, for appellant.

A. R. Smalley, for appellee.

ADAMS, CH. J.—The Circuit Court made a finding of facts in substance as follows: The defendant Ferguson borrowed of one John M. Hoopes the sum of \$224, upon which he agreed to pay 15 per cent interest per annum until the same should be paid. Afterward, to-wit, November 2, 1877, the defendant and John M. Hoopes had an accounting and it was agreed that the defendant should give Hoopes the use of a certain building in the town of Dallas Center for two years in full payment for the money borrowed and interest thereon at 15 per cent per annum. Afterward, to-wit, September 26, 1878, the defendant and Hoopes made a new deal. The defendant desired the use of the lower story of the building and Hoopes released or surrendered it to him. Hoopes had taken the whole building at an estimated rental of \$12.50 per month, and it was estimated in the new deal that the lower story was worth upon that basis \$8.50 per month, leaving \$4 per month as the rental value per month of the remainder of the building. In this new deal six notes were executed by the defendant for \$26 each, and were made payable to the plaintiff, one of which is the note in suit. The court found that these notes were given for the balance due on the original claim as refigured by Hoopes and Ferguson on the basis of the original transaction, and that the note in suit was not purged of usury. It also found that the amount paid was more than sufficient to discharge the original debt with legal interest, and accordingly rendered judgment for the defendant.

The question certified was in these words: "Was the note

Hoopes v. Ferguson.

in suit purged of the usury in the original transaction by taking the lease of the lower rooms of the building referred to in the above statement of facts?"

1. USURY :
 payment in full: new contract.

The only difficulty in this case consists in determining what construction should be put upon this finding. It shows that the original indebtedness was paid in full, November 2, 1877, by the lease of the building. It also shows that about eleven months later the balance was paid by the execution of the six notes, one of which is the note in suit. Both of these statements cannot be strictly true.

The court must have meant, we think, that at the time the lease was given the parties considered the lease as given in full payment, and later when the lower story came to be re-leased the parties considered the original debt revived except so far as it was to be considered paid by the use of the premises actually enjoyed and to be enjoyed. This last conclusion we doubt not was formed by reason of the manner in which the sum of \$156, the amount of the six notes, was arrived at. They exceed the amount of \$8.50 per month, the estimated rental value of the lower story for the remainder of the term. It is evident that the amount could not have been found upon that basis. Besides the court expressly finds that the original indebtedness was refigured.

But we cannot ignore the finding that the original indebtedness was paid in full. Whatever was done afterward was a mere releasing of the lower story in consideration of the execution of the six notes. The original indebtedness could not be revived after it was once fully discharged. The fact that the parties figured upon the basis of that indebtedness in determining for what amount the notes should be given, would not be inconsistent with the fact that they were given for the release. It was the right of the parties to make such bargain as they pleased for the release. When made the defendant became indebted anew by reason of the release. This is the construction which the law must put upon the new transaction,

Furman v. The C., R. I. & P. R. Co.

whatever the understanding of the parties may have been, if, as the court found, the old indebtedness was fully paid.

If the lease had been given as a device to cover usury, the case might be different, but the court not only did not so find, but found that the money was borrowed prior to the execution of the lease from which we infer that it was an independent transaction. We think that judgment should have been given for the plaintiff.

REVERSED.

FURMAN V. THE C., R. I. & P. R. CO.

87 42
81 841

1. **Railroads: ATTACHMENT: AGENCY: INSTRUCTIONS.** Where household goods belonging to the wife were delivered to a railroad company for shipment by the husband, and were attached while in the defendant's depot, in a suit against the husband, and notice thereof was duly given to him while so acting as the agent of his wife, and in time to assert a right to the goods; *held*, that the law would recognize the husband as the wife's agent in transactions relating to the removal of their household goods; that she could not recover for failure to deliver the goods; and that the verdict was so in conflict with the instructions and the testimony it should have been set aside.
2. **Instructions: PRACTICE.** Where there was no evidence whatever, tending to show collusion, an instruction directing the jury to inquire whether the goods were seized by collusion on the part of the defendants was erroneous.

Appeal from Muscatine District Court.

SATURDAY, OCTOBER 22.

ACTION to recover the value of certain household goods delivered to defendant at Chicago for transportation to Atchison, Kansas, which defendant has failed to deliver to plaintiff, the consignee. There was a verdict and judgment for plaintiff; defendant appeals.

Furman v. The C., R. I. & P. R. Co.

J. Carskaddan, for appellant.

Brannon & Jayne and *Hoffman, Picker & Brown*, for appellee.

BROCK, J.—I. The petition alleges that the goods in question were delivered by plaintiff to defendant for transportation under a contract obligating defendant to deliver them to plaintiff at Atchison, Kansas, and that defendant has failed to deliver the goods which have been lost to plaintiff. The answer admits the receipt of the goods and alleges that they were seized while in defendant's depot at Chicago, upon an attachment issued in an action against George M. Furman, the husband of plaintiff, and subsequently sold upon legal process, of which plaintiff had full notice long prior to the sale. It is also alleged that in truth the goods were the property of plaintiff's husband.

II. At the trial, after the parties had introduced evidence upon the issues raised by the pleading, the court gave the jury the following instructions:

"5. It is in effect conceded that the goods were taken from the defendant by an officer of the law, under and by virtue of a writ of attachment against the husband of the plaintiff, substantially as alleged in the answer. If this was done without collusion of the defendant, it was not incumbent on the defendant to resist the officer, although the attachment was not against the shipper and consignee of the goods, or to contest the claim of the plaintiff to the goods in that suit, or in any other way. But in such case the defendant, to relieve itself from liability, must, if the goods belonged to the plaintiff, show that she, plaintiff, had actually had knowledge of the taking of the goods as aforesaid, and in time to have properly asserted her right thereto, or that the defendant gave her immediate notice thereof after the seizure."

"6. This knowledge or notice may be shown by evidence either direct or circumstantial, and may be had by or given to

Furman v. The C., R. I. & P. R. Co.

the plaintiff directly or through any authorized agent, but the agent in such case must be an agent in reference to the matters or things in controversy."

The following instructions were given by request of the defendant:

"1. If you find from the evidence that the husband of the plaintiff was her agent in regard to the shipment and control of the goods in controversy, then any knowledge or notice respecting the attachment of the goods in Chicago, which was given to or received by the husband, was, in the eye of the law, given to the plaintiff, and the legal effect of such knowledge or notice is the same as though the plaintiff had received it in person.

"2. The fact that one person is the authorized agent of another, may be implied or inferred from the relation of the parties, and the nature and character of the business or transaction in regard to which such agency is claimed, or the question about such agency arises. And such agency may be presumed from the prior acts of the agent in reference to the particular business in question, if such prior acts of the agent have been acquiesced in and ratified by the principal.

"3. If you find that the husband of the plaintiff was her agent in regard to the household goods in controversy, as for the purpose of shipping the same by defendant's railway, and receiving receipt therefor, then the defendant had a right to presume that he continued to be her agent in regard to said goods, unless notified that such agency had ceased."

Without inquiring as to the correctness of these instructions we must regard them as the law of the case, and if it be found that the verdict is in conflict therewith the judgment must be reversed. *Peterson v. Ochs et al.*, 40 Iowa, 501; *Boyer v. Riley*, 41 Iowa, 13.

The evidence shows without conflict that plaintiff's husband acted for her in delivering the goods to defendant, and that the shipping receipt was delivered to him. Indeed it seems that

Furman v. The O., R. I. & P. R. Co.

he had full authority from plaintiff to deliver the goods to defendant and contract for their transportation to Atchison. After the delivery of the goods the husband determined to make his home in Muscatine instead of Atchison and so advised the plaintiff who joined him at the latter place. Prior to her arrival and after the purpose upon the part of both had been formed to establish themselves at Muscatine the husband applied to the defendant to have the goods transported from Atchison to Muscatine, and was then informed that they had been seized in Chicago. The law will surely recognize the husband as the wife's agent in transactions relating to the removal of their household furniture, the title whereof is in the wife. Nor can we doubt that the husband's agency for the shipment of the goods in this case extended to authorize him to change their destination. It is therefore made to appear that the husband obtained notice of the seizure of the goods while acting as an agent of plaintiff. It is shown without conflict that he endeavored to release the goods from seizure, and employed an attorney to take steps in that direction, and to contest the action in which the attachment was issued. The plaintiff or her husband, after they had notice of the attachment, had ample time to assert plaintiff's right to the goods.

We are clearly of the opinion that under the instructions the jury should have found for the defendant, and that their verdict is so in conflict with the testimony that under the familiar rules relating thereto it ought to have been set aside by the court below. The court therefore erroneously overruled the motion for a new trial based upon this ground.

III. The fifth instruction in effect directs the jury to inquire if the goods were seized by collusion upon the part of defendant. This clause of the instruction is erroneous and ought not to have been given for the reason that there was no evidence whatever tending to show collusion or fraud on the part of the defendant.

For the errors pointed out the judgment of the District Court must be

REVERSED. .

2. INSTRUCTIONS : practice.

CUNNINGHAM V. GAMBLE.

1. **Homestead: ELECTION: REASONABLE TIME.** A surviving wife has a reasonable time in which to make her election whether she will retain the occupancy of the homestead, or claim her right to one-third of the entire real estate in fee-simple.
2. —: **PRODUCTS AND INCOME.** The survivor, during the reasonable time that he or she may occupy the homestead prior to election, should be allowed to receive the profits and income, and be accorded the same fullness of enjoyment as after election.
3. —: —: **RULE APPLIED.** In this case it was held that the surviving wife was entitled to the rents of a coal-mine opened upon the homestead, and in a workable condition prior to her husband's death.

Appeal from Marion Circuit Court.

SATURDAY, OCTOBER 22.

ACTION for rent of a coal mine. The petition shows that the plaintiff is the widow of A. C. Cunningham, deceased, and as such she is in possession of the homestead; that her husband during his life time caused a coal mine to be opened upon the land, and furnished the same with necessary shafts, cars, and machinery; that afterwards he leased the same for a term of years to the defendant, at the stipulated rent of sixty-five cents for each hundred bushels of coal that should be dug, not including entry coal; and that there is due as rent the sum of \$86.88.

The defendant, for answer, admits the lease as averred, the homestead character of the premises, the occupancy by plaintiff, and that he has dug 13,220 bushels of coal since A. C. Cunningham's death, but he avers that A. C. Cunningham died intestate, leaving as his only heirs the plaintiff and three children; that the plaintiff has made no election as between the right of occupancy of the homestead and the right of dower; that the amount due from him for coal is due to A. C. Cunningham's estate, and not solely to the plaintiff, by reason of her occupancy of the homestead where

57	46
86	533
57	46
998	49

57	46
1140	693

Cunningham v. Gamble.

the coal was dug, because without her election her occupancy is to be regarded as merely temporary, and in any event, she is entitled to nothing more than occupancy; and he avers that the coal is taken out through a single shaft, and without any interference with her occupancy.

The plaintiff demurred to the answer, and the demurrer was sustained. Judgment having been rendered for the plaintiff, the defendant appeals.

James D. Gamble, for appellant.

Stone, Ayers & Co., for appellee.

ADAMS, CH. J.—It was held in *Butterfield v. Wicks*, 44 Iowa, 313, that the occupancy of the homestead may be regarded as an election to hold it as a homestead, and as a waiver of the right of one-third of the entire real estate in fee-simple, as a distributive share. While this ruling is doubtless correct, occupancy is not necessarily to be regarded as evidence of such election. If it were so, the survivor left in possession of the homestead, but desiring not to waive his or her right to the distributive share, would need to make an election to take such share instantaneously upon the death of the decedent. In our opinion, the law contemplates that the survivor shall have a reasonable time to make the election. The averment of the answer, therefore, that the plaintiff has made no election may be considered true, notwithstanding the answer admits the occupancy.

We have then to determine what are the rights of the survivor during the reasonable time allowed to make the election.

In our opinion, they differ in no respect from the rights of the survivor after election to hold the homestead, except in regard to the tenure by which the rights are enjoyed. There must, we think, be accorded the same fullness of enjoyment before as afterward. Any other rule would give the survivor the right to but a partial enjoyment, while

1. HOME-
STEAD: elec-
tion: reason-
able time.

2. —: pro-
ducts and in-
come.

 Cunningham v. Gamble.

others would have a right to a partial enjoyment also. And we cannot think that the law contemplates such a division. The right of others being subject to be terminated at any time by the election of the survivor to hold the homestead, would be of no especial value. We think that the survivor, during the reasonable time that he or she may occupy the homestead prior to election should be allowed to receive the products and income generally. It is true that if the survivor is allowed to receive the products and income of the homestead before election, and then elect to take his or her distributive share, he or she might gain something by deferring the election. But no great abuse of this kind could be practiced. Any unreasonable deferment would be held to evince an election to hold the homestead and to waive all right to a distributive share.

Having reached the conclusion that the survivor's mode and extent of enjoyment prior to election are the same as after a. — : — :
rule applied. election to hold the homestead, we come to inquire what is the extent of the survivor's enjoyment of the homestead after election to hold.

The language of the statute is that "the survivor may continue to possess and occupy the whole homestead." A like statute was construed in *Floyd v. Mozier*, 1 Iowa, 513, as giving the surviving widow the same rights to the rents and profits of the homestead as the husband had when living. She was held to be "the owner during life of such homestead," and entitled to the rents and profits, "to use as the head of the family." It was also held that while the children, if there are any, may have certain interest in the rents, it is not a direct, certain, and legal interest, and she alone can maintain an action for the rents.

Whether she alone could execute such lease of the premises as would give the lessee a right to open and work a new mine we need not determine. The mine in question was already opened, and was so furnished as to be in a workable condition at the time of the plaintiff's husband's death. That the plaintiff occupying as surviving widow may take the rents

Conger v. Cook.

of such a mine for family support, we have no doubt. Her right certainly could not be deemed less than those of a tenant for life. That such a tenant is entitled to the rents and profits of an opened mine has been repeatedly held. *Billings v. Taylor*, 10 Pick, 460; *Moore v. Rollins*, 45 Me., 493; *Coats v. Cheever*, 1 Cow, 460; *Hoby v. Hobby*, 1 Vern., 218; *Stoughton v. Leigh*, 1 Faust, 402. The objection that the working of such a mine is a partial destruction of the inheritance is not deemed valid. On the other hand the working of such a mine is considered a mere mode of enjoyment of the premises.

The defendant cites *O. & S. W. R. R. Co. v. Swing*, 38 Iowa, 182; and *Harkness v. Burton*, 39 Iowa, 101, but in our opinion those cases are not applicable.

We think that the court did not err in sustaining the demurrer to the answer, and the judgment must be

AFFIRMED.

CONGER V. COOK.

1. **DOWER: TAXES.** Taxes paid by the administrator from the personal estate should not be made a charge upon the widow's distributive share.
2. **Homestead: LIENS.** Where the widow's dower was admeasured to include the homestead and other lauds, the decree was construed to charge the homestead with one-third of the mortgage thereon alone, and her distributive share in other lands, with a *pro rata* liability as to the mortgage thereon, and approved.

Appeal from Adair Circuit Court.

MONDAY, OCTOBER 24.

CHARLES WILSHIRE died in 1878, seized in fee of 560 acres of land in Adair county, and 155 acres in Guthrie county. The plaintiff is administrator of his estate. The personal property being insufficient for the payment of the debts the plaintiff asked an order for the sale of real estate for that purpose.

 Conger v. Cook.

Ina M. Cook, widow of the deceased, and Wm. Wilshire, his only child were made parties to the proceeding. Ina M. Cook filed a cross-petition in which she demanded that her dower in the land be assigned to her so as to include the homestead. The homestead, forty acres, was incumbered by a mortgage for some \$300, and 400 acres of the other land was mortgaged for \$4,000. These mortgages were both executed by Charles Wilshire and his wife Ina M. Wilshire, now Cook. There was also a judgment against Charles Wilshire which was a lien upon the real estate in Adair county, and the tax for 1878 on the Adair land was unpaid. It was ordered that appellants dower be admeasured and set off to her in one body so as to include the homestead. The court further ordered that the widows share "so set off is hereby ordered burdened and held to the payment of one-third of the taxes and judgment and the mortgage liens in wich Ina M. Cook joined with her husband upon said real estate at the date of the decease of said Charles Wilshire."

From this order Ina M. Cook appeals.

H. E. Long, for appellant.

Ben. S. Adams and McCoughan & Dabney, for appellees.

ROTHROCK, J.—I. As we understand it, the appellee does not claim that appellant's distributive share should be charged with any part of the judgments. Pending the appeal he served a notice on counsel for appellant to the effect, that if the decree should be construed to make such charge he would consent to its modification. This question may therefore be considered out of the case.

II. It would have been a much more preferable mode for adjusting the rights of these parties if there had been an order made requiring one-third in value of the real estate to be set off to the widow and then after ascertaining the tracts assigned to her make the order as to the

1. DOWER:
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Baldwin v. Oskaloosa Gas Light Company.

liens. The order is so indefinite as it is, that we are not able to determine the question intelligently. It appears that the taxes have been paid by the administrator from the personal estate. They were therefore no longer a lien, and should not be made a charge upon any of the land.

III. The counsel for appellee protests that the decree makes no charge upon the homestead excepting one-third of the mortgage which was upon the homestead alone, and that as to the other mortgage the widow's distributive share is subjected to a *pro rata* primary liability. The decree may, we think, be so construed. If so it is in accord with the case of *Trowbridge v. Sypher*, 55 Iowa, 352, and charging the homestead with no more than one third of the mortgage which is upon it alone is not inconsistent with the cases of *Wilson v. Hardesty*, 48 Iowa 515, and *McGlothlin v. Hite*, 55 Iowa 392. In those cases the mortgages included the homestead and other lands.

MODIFIED AND AFFIRMED.

BALDWIN V. OSKALOOSA GAS LIGHT CO.

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96	614
97	349

1. **Nuisance: FINDINGS OF JURY: STATUTE OF LIMITATIONS.** Where, in an action for damages for the erection and use of gas works, the jury found the works were of a permanent character, but considered they were incompetent to decide whether such erection and use were a permanent injury to plaintiff's property; *Held*, the jury intended and found thereby that the injury was of a permanent character, and began when the works were erected and used; and that the action was barred in five years after such erection and use.
2. —: **INSTRUCTIONS.** The instructions should have stated clearly and explicitly what damages were recoverable for, and that a party is only liable for the nuisance caused by himself.

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4119	477

Baldwin v. Oskaloosa Gas Light Company.

Appeal from Keokuk District Court.

MONDAY, OCTOBER 24.

ACTION to recover damages for a nuisance. The petition states: The gas works of defendant were erected in 1872, and that "defendant in manufacturing gas ever since that time causes and creates unwholesome, noisome and offensive smells which * * all caused, created and permitted by the defendant, to the great injury of the plaintiff, rendering her property uninhabitable and worthless." In a second count it was stated that "the defendant manufactred gas in such a careless, negligent and unskillful manner in not keeping its machinery in proper repair, and in not using the latest and best improved machinery, and in using the poorest and most worthless substances for the manufacture of the same, and in using none of the machinery or appliances usually and commonly used to prevent the escape of noisome, unwholesome and offensive smells, causes, creates and permits "such smells to escape in such quantities as to render plaintiff's homestead and property worthless." The third count need not be set out as no damages were found under it. In an amendment to the petition, it was stated the nuisance referred to in the original petition has wholly destroyed the rents and profits of plaintiff's premises. The defendants denied the allegations of the petition and amendment, and pleaded the statue of limitations. Afterward the plaintiff withdrew so much of the amendment to the petition as claimed damages because of a loss of rents and profits.

Trial by jury. There was both a general and special verdict. On the latter the defendant moved for judgment, but was overruled and judgment entered on the general verdict for the plaintiff. The defendant appeals.

 Baldwin v. Oskaloosa Gas Light Company.

C. P. Searle, John F. Lacey and Iafferty & Johnson, for appellant.

Bolton & McCoy, for appellee.

SNEEVERS, J.—I. The plaintiff is the owner of certain lots on which there is a dwelling house near the works of the defendant. It is regarded as being beyond controversy, from the evidence introduced, instructions and special verdict, that the cause was tried in the court below on the theory: First, That the nuisance was of a permanent character and the property of the plaintiff rendered thereby “uninhabitable and worthless;” and Second, That the plaintiff was entitled to recover for the “depreciation of the rental” value of the property caused by the nuisance. The cause has been argued in this court on such theories, and we shall take the case as it has been put to us by counsel, without stopping to inquire why it was so tried below or argued here.

Among the special interrogatories put to the jury is the following, which was answered by them as stated thereunder:

“8th. Do you find from the evidence under the instructions of the court that the gas works were so built as to be regarded as permanent, and was the erection and beginning of the use thereof a permanent injury to plaintiff’s property?”

Ans. We, the jury, from the evidence and instructions of the court, regard the gas works as permanent, but consider ourselves incompetent to decide whether or not their erection and use is a permanent injury to the plaintiff’s property, as ways and means *may* possibly be devised to operate them in such a manner that they *may* cease to be regarded as a nuisance.”

If the works were of a permanent character, and the erection and beginning of the use thereof a permanent injury to the plaintiff’s property, then the cause of action is barred by

the statute, because the works were erected in 1872, and this action was not commenced until 1878.

The jury found the works were permanent. Whether the injury was of the same character depended, in the opinion of the jury, whether ways and means might not in the future be devised so that the works should cease to be regarded as a nuisance. From the questions put to the jury, and answer thereto, we think it reasonably clear the jury intended to and did find the nuisance and injury were of a permanent character, and that the same began when the works were erected. There was evidence so tending, and we do not understand counsel for the appellee to claim the verdict is susceptible of any other construction. The point made by counsel for appellee is, that because the jury have found means may be devised whereby the works would cease to be a nuisance, therefore it cannot be said it is of a permanent character. But we are of the opinion the jury had no right to speculate as to what might take place in the future. It was their duty to determine only as to existing facts, and leave the uncertain future to take care of itself. The rights of these parties cannot be predicated on the future, what may take place, or the ingenuity of man may devise, but on existing things. Now, as the jury have found the injury or nuisance was of a permanent character, a right of action accrued at the time the injury began, especially is this true if the premises were rendered "uninhabitable and worthless," as alleged in the petition. For such permanent injury, the plaintiff was entitled to recover all the damages sustained in one action, and therefore the action was barred, and the court should have rendered judgment for the defendant on the special verdict. *Powers v. Council Bluffs*, 45 Iowa, 652.

II. Upon the theory the plaintiff was entitled to recover for depreciation in the rental value of the property, the jury were instructed as follows: "And further
2. _____: instructions. on this point—if the gas works when erected

Baldwin v. Oskaloosa Gas Light Company.

were not of a permanent character, or the usual and ordinary manner of operating such works would not cause a nuisance, and damage to the property of the plaintiff, then she can recover for the depreciation of the rental value arising from the property, within five years prior to the 12th day of November, 1878."

We have had much difficulty in determining the meaning of this instruction. Our doubts being, whether the jury could have understood they were authorized to allow damages not only for the offensive smells, but also because of the erection of the works themselves. Now, as it is not claimed in the petition the works were a nuisance, but they became such only by reason of their offensive character, the jury should have been directed in clear and explicit terms that damages for the latter only could be recovered. Should there be a re-trial, an instruction should be given in accord with these views.

III. There was evidence tending to show there was a railway track near the premises, and offensive smells were caused by passing engines, and that such smells were caused by what is called "Seibel's ditch." At the request of the plaintiff, the court instructed the jury as follows:

"If you find that other nuisances existed in the same neighborhood and you also find that defendant's works added to the nuisance so that they essentially interfered with plaintiff's comfortable enjoyment of life or property, she is entitled to recover."

There is no doubt that defendant is only responsible for the smells or nuisance created or caused by it. Under the foregoing instruction, the jury would be justified, or at least may have found the plaintiff was entitled to recover for a nuisance caused by others than the defendant. The instruction is not as clear and specific as it should be. Whether we would reverse, for this reason, if there were no other errors in the record, we need not determine.

REVERSED.

THE CITY OF CENTERVILLE V. MILLER.

1. **Municipal Corporations: CITY ORDINANCE: NUISANCE.** A city ordinance which declares the keeping of a house where loud and unusual noises are permitted a nuisance; and provides that whoever is convicted thereof shall be punished, is valid under section 456 of the Code. It does not define an offense punishable by the laws of the State.

Appeal from Appanoose District Court.

MONDAY, OCTOBER 24.

THE defendant was convicted in the mayor's court of the city of Centerville of having violated an ordinance of the city. The ordinance in question (119) provides among other things that the keeping or controlling of any house or building within the corporate limits of the city where loud or unusual noises are permitted, or where persons are permitted to congregate and engage in the use of profane or vulgar language to the disturbance of others, is a common nuisance, and that whoever is convicted thereof shall be punished.

The information charged that the defendant, within the corporate limits of the city, kept and controlled a house wherein and around which loud and unusual noises were permitted, and wherein and around which persons were permitted to congregate and make use of loud, profane, and vulgar language to the disturbance of others, and contrary to the provisions of the ordinance.

From the conviction in the mayor's court the defendant appealed to the District Court, and demurred to the information on the sole ground "that the court has no jurisdiction of the offense charged." The demurrer was overruled, and the defendant elected to stand thereon, and judgment was rendered against him as provided in the ordinance. He appeals.

Geo. D. Porter, for appellant.

Vermillion & Vermillion, for appellee.

SKEEVERS, J. — It is provided by statute that cities have the power to prevent riots, noise, disturbance or disorderly assemblages; to suppress and restrain disorderly houses, houses of ill-fame, billiard-tables, nine or ten-pin alleys or tables, and ball-alleys, and to authorize the destruction of all instruments and devices used for the purpose of gaming." Code, section 456.

1. MUNICIPAL
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The appellant insists the ordinance is void because the offense described therein and charged in the information is punishable under the laws of the State, and therefore the city cannot provide for the punishment of the same offense. No statute is cited defining and punishing the offense charged in the information, and we have not been able to find any such.

The information does not charge an unlawful assemblage, or a nuisance as defined by statute (Code, sections 4066, 4067, 4069, 4080.) Nor does the information necessarily define such offenses. We are, therefore, unable to say the ordinance is void because the offenses referred to therein are punishable under the laws of the State.

The appellant cites, and largely relies on *The City of Chariton v. Barber*, 54 Iowa, 360. In that case it was thought the power to "suppress and restrain" did not authorize the city to punish the keeper of a house of ill-fame. This information is not based on that clause of the statute, but upon the provision which authorizes cities to "prevent" riots, noises, disturbances, and disorderly assemblages. The cited case is largely based on *City of Mt. Pleasant v. Breeze*, 11 Iowa, 399, and we are not disposed to extend the rule therein announced. We know of no more effective way of preventing the commission of an offense than a provision providing for its punishment. Such power is clearly conferred and has been properly asserted.

AFFIRMED.

 Thomas v. Desney.

THOMAS V. DESNEY.

1. **Agent: NEGOTIATOR OF LOANS: NOTICE TO.** Where parties sign an application for a loan, agreeing to pay all expenses, the person employed to negotiate the loan is the agent of the borrower, and notice to him of defects in the title is not notice to the lender.
2. **Constructive Notice: MISNOMER.** Where two names, differing in sound, are commonly used as the same or are derived from the same source, as understood in the English language, the use of one for the other is no misnomer. *Held*, that "Helen" and "Ellen" are distinct names, and that a judgment entered and indexed against Ellen Desney is not constructive notice of a lien against the lands of Helen Desney.
3. —: **INDEX.** Where a party is not charged with constructive notice by the index book of judgments, he is not bound by what appears of record.

Appeal from Guthrie Circuit Court.

MONDAY, OCTOBER 24.

ACTION to foreclose a mortgage executed by Helen and Daniel Desney. Messrs. Jackson and C. Aultman & Co. were made defendants, it being stated they claimed title to or a lien on the mortgaged premises, but that the same was junior to the mortgage. A decree by default was entered against all the defendants except Aultman & Co. Between the latter and the plaintiff it was stipulated the cause should be "referred to Hon. J. R. Barcroft, to take the evidence in writing, to find the facts and law, and to report to the court." This was done; the referee made his report, to which Aultman & Co. filed exceptions, which were overruled; the report confirmed and a decree entered for the plaintiff. Aultman & Co. appeal.

Phillips, Goode & Phillips, for appellant.

D. G. Edmundson, for appellee.

SEEVERS, J.—As the only parties to this appeal are the plaintiff and Aultman & Co., the latter will be designated defendant. The only contention between the parties is as to who has

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120 256
121 95
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128 702
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130 368

Thomas v. Desney.

the prior lien on the real estate mortgaged. The mortgage was executed and recorded in November, 1877, and thereunder the plaintiff claims. The defendant claims under a judgment by confession which was entered of record May 21, 1877. The judgment being prior in point of time the plaintiff claims it should be held to be junior to the mortgage on two grounds: First, the judgment was rendered against "Ellen Desney" and the plaintiff had "no knowledge, actual or constructive, of said judgment at the time of the execution of the mortgage." Second, the confession of judgment was delivered to one Moore as an escrow and the same was not to be filed or entered of record without the consent of the Desneys and when they had obtained a loan secured by mortgage on said land.

The referee found for the plaintiff on the last ground and declined to pass upon the first because unnecessary.

The plaintiff insists the finding of the referee is right, but claims whether this is so or not is immaterial, because the decree must be affirmed on the first ground. If the premises are correct it is in substance conceded to be so by the counsel for the appellant, but the latter insists:

I. That the mortgagee had express notice of the judgment. The real estate belonged to Helen Desney and it so appeared of record. She and her husband, Daniel Desney, 1. AGENT; negotiator of loans; notice to. confessed the judgment, and they employed one Moore to negotiate a loan to be secured by mortgage on the real estate. Moore made application therefor to the New England Loan and Trust Company, who either made the loan for the plaintiff with the funds in its possession belonging to him, or the application was submitted to him by the company and the loan made by the plaintiff. It is not deemed material which way it was done, as it will be conceded the company was the agent of the plaintiff who is a non-resident of the State.

We do not understand it to be claimed that either the plaintiff or the company had express notice of the judgment. If

 Thomas v. Desney.

mistaken in this, we are sure there is no evidence so tending. Moore did have such notice and it is insisted he was the agent of both the plaintiff and said company. Moore was employed by the Desneys and paid by them. He testifies: "Don't know but he was acting as agent for the company or for all parties." This is in the nature of a legal opinion and the plaintiff is not bound thereby. The fact is an application for the loan was signed by the Desneys, which was forwarded by Moore to the company. It described the land and the Desneys therein agreed to furnish an abstract of title and a sworn appraisal of the land and pay all expenses. The loan was made on said application. Moore was agent of the Desneys, and bound to do the best he could for them. Legally he could not well be the agent of both parties, and we do not think he was. He owed no duty to the plaintiff or said company and was in no way responsible to either. What he did or said could not be binding on the plaintiff, and therefore the latter and said company would not be bound by the knowledge of Moore. *Wyllis v. Ault*, 46 Iowa, 46; *Smith v. Wolf et al.*, 55 Iowa 555; *Dickey v. Brown et al.*, 56 Iowa, 426.

II. The next question is did the plaintiff have constructive notice of the judgment. The confession upon which it was rendered is entitled, "*C. Aultman & Co. v. Daniel Desney and Helen Desney*," and was sworn to by them. The judgment was rendered against "Daniel Desney and Ellen Desney," and was so indexed in the judgment docket. The defendant insists that "Helen" and "Ellen" are the same. The rule is said to be: "If two names are taken promiscuously to be *the same name in common use*, though they differ in sound, there is no variance. When two names are *derived from the same source*, or when one is an abbreviation or corruption of the other, but both are taken by common use to be the same, though differing in sound, the use of one for the other is not a misnomer." *Trimble v. The State*, 4 Blackford, 437; 5 Bacon's Abr., "Misnomer"; 7 American

2. CONSTRUCTIVE notice: misnomer.

Thomas v. Desney.

Common Law, 51, are cited in support of the foregoing proposition. Its correctness will be conceded.

The first proposition is if the names are commonly used as the same, though they differ in sound, if either is used it is not a misnomer, as Elizabeth, Bettie and Bessie, or Sarah, Sara and Sally. This may be admitted but Helen and Ellen have not been commonly used as the same. There is no evidence so tending, and Mrs. Desney was not known by the name of Ellen, nor did she at any time so write her name. We think the names have been known and generally recognized as different and distinct.

The last proposition is where one is an abbreviation or corruption of the other, but both are taken by common use to be the same, though differing in sound, the use of either is not a misnomer. But "Helen" is not in our opinion an abbreviation or corruption of "Ellen;" nor is the latter an abbreviation of the former, nor are they commonly or indiscriminately used as the same, to our knowledge, and certainly the evidence does not so show. The second proposition is if the names are derived from the same source the use of one for the other is not a misnomer, and it is insisted that this is so as to the names in question. The argument being that "Helen" and "Ellen" are "both derived from the Greek and the difference in spelling in English doubtless results from the difference between the two Greek letters *epsilon* and *eta*. Ellena, if the Greek letter *eta* was used in commencing the word would be pronounced Hellena, the letter *eta* embracing the asperate H when pronounced. Thus the Greeks are denominated among the classics Ellenes or Hellenes indifferently, both meaning the same thing." Donnegan's Greek Lexicon, 473, and Websters Unabridged Dictionary, title, names of women, such as Eleanor and Elenor are cited. It seems to us the logical result of the argument is that in order to be an accurate, reliable and safe abstractor a person must be versed in the Greek language and not only so but in all other languages from which names now used in

 Thomas v. Desney.

this country may have been derived. There is no statute requiring a person to employ an abstractor, therefore every person must be so versed before he can safely purchase real estate. We cannot think this is the meaning of the rule, but at most it should be held to mean if both names are derived from the same source as defined and understood in the English language, then the use of one for the other should not be regarded as a misnomer. We, therefore, hold the plaintiff was not chargeable with constructive notice of said judgment because it was indexed as being against Ellen Desney instead of Helen Desney.

But counsel say if the index did not impart notice, the record, if examined, would have done so, and therefore the plaintiff had constructive notice of the judgment, and *Huston v. Seeley*, 27 Iowa, 183, is cited in support of this proposition. In that case the true name was Almira S. Stringham and the deed of trust was so indexed, and it was held the party was charged with notice of what the index contained, and this being so he was bound to look further and was therefore bound by what appeared of record. To the same effect is *The State v. Shaw*, 28 Iowa, 67. The rule may be that when a person is charged with constructive notice of the index he is also chargeable with notice of what appears of record. But we have no such case before us and we deem it clear if a party is not charged with constructive notice by what appears in the index book he is not bound to look further, and therefore is not bound by what appears of record.

It is said the plaintiff did not examine the index book and therefore was not in fact misled. This is immaterial. He was bound by whatever appeared in said book whether he examined it or not. He was not bound to examine it and in such case is only chargeable with notice of what it contains.

The court held the judgment to be valid and a lien on the premises junior to the mortgage. As between the parties to this appeal this was correct and the judgment will be

AFFIRMED.

 Douglass v. Kessler.

DOUGLASS V. KESSLER ET AL.

1. **Guardian: ADDITIONAL BOND: LIABILITY OF SURETY.** Where a guardian filed a new bond with sureties, but was not discharged or re-appointed, nor were the sureties on the old bond discharged, and the evidence failed to show whether he then had the money previously received, or had misappropriated it; *held*, that such bond was an additional or cumulative security for the entire guardianship; and that the obligors thereon were liable for the entire defalcation.

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 124 140
Appeal from Dubuque Circuit Court.

MONDAY, OCTOBER 24.

IN 1866 R. G. Bishop was appointed guardian of the plaintiff, who was then a minor, and he gave bond as provided by law. In January, 1873, a citation was issued, requiring Bishop to show cause why he should not file a new bond, because the surety on the old bond was not a resident of the State, and was not worth the amount of the bond. On the 29th day of said month Bishop, in pursuance of an order of the court, gave such bond—the one sued on. In January, 1875, a petition was filed asking the removal of Bishop, and on the 16th day of said month the court made an order, “that R. G. Bishop, the present guardian be and is hereby discharged as such.” Hubert O'Donnell was thereupon appointed guardian of said minor. Shortly afterward Bishop filed a motion to set aside the appointment of O'Donnell, and on the 21st day of April the court sustained the motion, the order being, “the appointment of Hubert O'Donnell is set aside.” Nothing ever came into the hands of O'Donnell. The record fails to show Bishop was reappointed, but he seems to have regarded himself as guardian, and he was recognized as such. Bishop is dead, but the time of his death is not shown. During his lifetime there came into his hands \$643.42 more than he accounted for, a part of which was received before the bond sued on was executed. Judgment was rendered for \$643.42 and interest. The defendant appeals.

D. J. Lennehan, for appellants.

W. J. Cantillon, for appellee.

SEEVERS, J.—An opinion in this cause was filed at a former term. Both parties asked, and there was granted, a rehearing. 1. GUARDIAN: We have re-examined the whole case, being aided additional bond: liability of surety. therein by additional arguments of counsel, and have reached the following conclusions.

I. As to the money which came into the hands of Bishop before the bond sued on was executed, the order of the court was as follows: "It appearing to the court that the present bond is insufficient, and additional bond necessary, it is therefore ordered by the court that said R. G. Bishop file bond with sureties, to be approved by the clerk of this court, in the penal sum of \$1,000, to be filed by the 5th day of April, 1873." In pursuance of this order the bond sued on was filed. The sureties on the old bond were not, nor was Bishop, discharged or reappointed. He continued to act under the original appointment. The intent of the court undoubtedly was that an additional bond or security should be given. There is nothing on the face of the bond showing it should not be so regarded. The only condition being that Bishop should faithfully "discharge all the duties imposed upon him by law." The evidence fails to show whether Bishop held the money previously received or whether he had misappropriated it. Under such circumstances, we understand the rule to be that the sureties on the additional bond are liable for the default of the guardian previous to the filing of such bond. *Loring v. Baker* 3 Cushing, 465; *Bell v. Jasper*, 2 Ird. Eq., 597; *Jones v. Blanton*, 6 Ib., 115; *Hutchcraft v. Shrout*, 1 Mon., 206; *Ammons v. The People*, 11 Ill., 6; Brandt on Suretyship and Guaranty, § 463, and authorities cited. There is no statute in this State preventing the application of this rule, and there

Douglass v. Kessler.

cannot be any "legal objection to the filing of several similar bonds by a guardian, with a single surety on each, instead of one joint bond with joint sureties." It was the duty of Bishop to faithfully account for all the money he had received and the defendants became his sureties that he would do so. Because he has failed they are liable. If Bishop had been reappointed and entered upon a new term it may be it could be properly said the sureties should be held only for the defalcations occurring during such time. The new bond "was not intended to operate as collateral security or prospectively only." The least that can be said of it is that the obligors intended that it should operate as an additional and cumulative security to the ward for the entire guardianship of Bishop. *Bell v. Jasper*, before cited.

II. The next question is did any of the money come into the hands of Bishop after he was discharged and O'Donnell appointed? The only evidence bearing upon this question is the reports of Bishop made to the court. A careful examination of the abstracts satisfies us that the last money received by Bishop was in December, 1874, and he was not discharged and O'Donnell appointed until January 16, 1875. It follows the defendants are liable for the whole defalcation.

AFFIRMED.

 Potter v. Worley.

POTTER ET AL. V. WORLEY ET AL.

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| 57 | 66 |
| 142 | 804 |
1. **Dower: WILL.** A widows' right of dower will not be barred by accepting the provisions of the will, when not inconsistent with her claim for dower. Following *Metteer v. Wiley*, 34 Iowa, 214.
 2. ———: **UNASSIGNED: HEIRS.** When the widow fails to have her dower interest set apart during her lifetime, her heirs may recover the same after her death.
 3. ———: ———. On rehearing, *held*, that under Sec. 2435, Rev., the widow was not required to object to or relinquish her rights under the will before she could claim dower, where her dower was in fee simple and vested immediately.

Appeal from Cedar District Court.

MONDAY, OCTOBER 24.

ACTION for the partition of real estate. Trial to the court, judgment for the defendants and the plaintiffs appeal.

F. C. James and *Wolf & Landt*, for appellants.

Pratt & Carr, for appellees.

SEEVERS, J.—The material facts are the real estate in controversy was owned by John Worley in his lifetime. He died December 14, 1864, on which day he executed a will devising all his property to Sarah Worley his wife for and during her life. Said will further provided that upon the death of Mrs. Worley, the property of the testator should be equally divided between his brothers and sisters, who are defendants in this action. Sarah Worley, at the decease of her husband, took possession under the will of all the property, both real and personal, and used and controlled the same as her own until her death in 1877.

The plaintiffs are her heirs at law, and as such claim that Mrs. Worley upon the death of her husband, became the owner of one-third of the real estate in fee simple of which her

Potter v. Worley.

husband died seized as her dower, and that they are entitled to recover the same, although Mrs. Worley did not object to the will and relinquish all the rights conferred thereunder, and did not have the said one-third interest assigned, or set apart during her lifetime. The legal propositions presented under the foregoing facts are:

I. Whether Mrs. Worley by accepting the provisions of the will thereby barred her rights to the one-third of the real estate in fee simple as her dower. This question
 1. DOWER : under a precisely similar will has been determined
 will. in the negative in *Metteer v. Wiley*, 34, Iowa 214, the ground of the ruling being that there was no inconsistency between the taking under the will and the claim to dower. The case just cited, and that at bar, are distinguishable from *Kyne v. Kyne*, 48 Iowa 24. In this last case, the acceptance of the provisions of the will was inconsistent with any claim of dower by the widow. Hence it was held her failure to object to the will, and assert her right to dower, prevented her devisees after her death from asserting a claim thereto.

II. Does the failure of Mrs. Worley to have her dower interest assigned and set apart during her lifetime, prevent her heirs from recovering the same, after her death.
 2. — : unas- If there had been no will, there could not, under
 signed : heirs. the statute, Code, § 2440, be any doubt that upon the death of her husband, Mrs. Worley would have been vested with the legal title to one-third of the real estate, of which he died seized. This being so the estate would have descended to her heirs, whether her interest had been set apart or not. The estate vests immediately upon the death of the husband, or it does not do so at all. Being a fee simple estate, it must of necessity descend to the heirs of the widow, unless she in some manner disposes of it in her lifetime. Such an estate cannot be obliterated, or destroyed by the mere passive action of the owner unless there is some statute which so declares. The only statute bearing on this question is Rev., § 2435, which

Potter v. Worley.

was in force when the will was executed, and at the time Mrs. Worley took possession thereunder. This statute was in force at the time the will was executed in *Metteer v. Wiley*, before cited, and at the time the rights in that case accrued.

The only point decided in *Rausch v. Moore*, 48 Iowa, 611, is that an unassigned dower interest was not liable to be seized on execution or attachment in a suit at law.

REVERSED.

ON REHEARING.

SEEVEES, J.—On the application of appellees, a rehearing was granted as to the first point in the foregoing opinion. As John Worley died when Rev., § 2435, was in force, counsel for the appellees insist that Mrs. Worley could not accept under the provisions of the will, and also have dower. That in order to obtain the latter, she must have objected to and relinquished rights conferred on her by the will. The said section is as follows: "The widow's dower cannot be affected by any will of her husband, if she objects thereto and relinquishes all rights conferred upon her by the will." This section is the same as § 1407, of the Code of 1851, from which it was taken. The construction of these sections is not an open question. It having been several times held, that if the claim of dower was not inconsistent with the provisions of the will, the widow was not required to object to or relinquish her rights under the will before she could have dower. *Corriell v. Ham*, 2 Iowa, 552; *Sully v. Nebergall et al.*, 30 Id., 339; *Metteer v. Wiley*, before cite; *Watrous v. Winn*, 37 Iowa, 72; *McGuire v. Brown*, 41 Id., 650. As the dower in the case at bar was one-third in fee simple, it vested in the widow immediately upon the death of her husband without action on her part.

On the other hand it has been held if the claim of dower is inconsistent with the provisions of the will, the widow cannot have both. *Cain v. Cain*, 23 Iowa, 31; *Shields v. Keyes*, 24 Id., 298; *Kyne v. Kyne*, 48 Id., 21. Those cases proceed on the theory that in such case, before the widow can have dower,

Anderson v. Park.

she must relinquish her rights under the will. In such case the dower does not vest immediately on the death of the husband, but when the election to take dower is made. The case at bar clearly comes within the rule of the cases first cited, and therefore the former opinion is adhered to.

ADAMS, CH. J., *dissenting*.

ANDERSON V. PARK.

57	69
94	282

1. **Justice of the Peace: APPEAL.** Under section 4697, Code, when the justice informs the defendant of his right to appeal, and the defendant gives the requisite notice, the appeal is taken.
2. —: **ILLEGAL COMMITMENT: PETITION: SUFFICIENCY OF.** Where the petition in an action upon a justice's bond for illegal commitment after the conviction, fails to show that the necessary steps to stay the judgment were taken, or that the justice did anything more than the law required or empowered him to do, it is not sufficient.

Appeal from Greene District Court.

MONDAY, OCTOBER 24.

THE defendant Park, was at the time of the acts complained of justice of the peace for Junction township, Greene county. His codefendants were sureties upon his official bond. In August, 1880, the plaintiff was convicted of an assault and battery before the defendant Park, as justice of the peace, and was sentenced to ten days imprisonment in the county jail, and was committed to jail. The plaintiff brings this action for damages alleged to have been sustained by him by reason of the commitment. The essential allegations of the petition are in these words: "The said defendant Park, having as such justice notified the defendant, the present plaintiff, J. G. Anderson, of his privilege of an appeal, and said Anderson having immediately then and there given oral notice of an appeal, and immediately then and there offered security and bond for appeal from

Anderson v. Park.

the judgment of said Park as aforesaid, the said justice Park did then and there refuse the appeal of this defendant, alleging and holding as such justice that defendant had no right to appeal. And then and there by virtue of his office as such justice of the peace willfully, maliciously, corruptly and oppressively committed this plaintiff to the common jail of Greene county, without any probable cause, where plaintiff remained for the space of three days. To the petition the defendant demurred and the demurrer was sustained. The plaintiff standing upon his petition, judgment was rendered for the defendant. The plaintiff appeals.

Holmes & Reynolds, for appellant.

L. K. Alder, for appellees.

ADAMS, CH. J. Section 4697 of the Code provides that "the justice rendering judgment against the defendant must inform 1. JUSTICE OF THE PEACE; appeal. him of his right to appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal by giving notice orally to the justice that he appeals."

The defendant having informed the plaintiff of his right to appeal, and the plaintiff having given the requisite notice, the appeal was taken. There was nothing which the justice could do or say about it which could deprive him of his appeal.

But the taking of the appeal does not of itself operate to stay judgment. And in the case at bar it was the execution of 2. — : me- gal commit- ment: peti- tion: suffi- ciency of. the judgment which constitutes the real ground of the plaintiff's complaint. If the defendant became liable it is because while acting in a ministerial capacity he did, or refused to do, something which resulted in the execution of the judgment.

The judgment was of course to be executed unless stayed. Now it appears to us that the petition does not show that the plaintiff ever took the steps necessary to stay the judgment.

Anderson v. Park.

To stay the judgment it was necessary for the plaintiff to put in bail in the amount fixed for that purpose, and in a form according substantially with a form prescribed. Code, section 4698. The most that the petition shows is that the plaintiff "offered security and bond for appeal." It is possible that the plaintiff intended by the language used to aver that he tendered a bond, but it does not necessarily mean more than that he offered to give security by a bond. But if it were conceded that the petition shows that a bond was tendered, it does not show that it was not disapproved. Such might have been the fact and the allegations of the petition be true. It was certainly the duty of the defendant to pass upon the bond, and it does not follow from the fact that he thought that the plaintiff was not entitled to appeal and so declared that he did not pass upon the bond. He thought at one time that the plaintiff was entitled to appeal and so informed him. If he refused to pass upon the bond the petition should, we think, have so expressly declared. Whether in case he had so refused he would have been liable to the plaintiff in damages, and if so whether he would have been liable in more than nominal damages in the absence of any showing that the plaintiff made unsuccessful application to the other officers to whom he might as well have applied for the approval of his bond as to the defendant, we need not determine.

The plaintiff in his argument lays great stress upon the fact that the petition shows that the defendant acted maliciously in committing him. But if the plaintiff had not taken proper steps to stay the judgment, that is, if he had tendered no bond, or none except what the defendant disapproved as insufficient, it was right that he should be committed. And if the defendant acted legally in committing the plaintiff, a court will not inquire whether he committed him under the supposition that he was acting illegally. Where a judicial or other officer does no more than what the law requires him to do, it is immate-

Henry v. Taylor.

rial so far as his legal liability is concerned in what state of mind he does it.

It appears to us that the petition does not show that the defendant did anything more than as justice of the peace he was empowered to do, except in refusing to allow an appeal after the appeal had been taken. By this refusal the plaintiff was not affected. He had his appeal. If the plaintiff took the proper steps to stay judgment and failed solely through the defendant's fault such fact is not shown. If judgment was stayed and plaintiff was committed in defiance of the stay such fact is not shown. The averment that the commitment was without probable cause must be taken to be a mere conclusion from the fact that the plaintiff gave notice of appeal and offered bond and security.

We think that the plaintiff's petition is insufficient and that the court did not err in so holding.

AFFIRMED.

HENRY ET AL. V. TAYLOR ET AL.

1. **Mandamus:** BOARD OF SUPERVISORS. Under section 332, Code, the board of supervisors have no discretion, and must divide a township where all the prerequisites of the law have been complied with, and the petition therefor is presented at the time authorized by statute.
2. **Jurisdiction.** Under the facts in this case, *held*, the court had jurisdiction of the subject-matter, and power to grant *mandamus*.

Appeal from Warren Circuit Court.

MONDAY, OCTOBER 24.

THE defendants constitute the board of supervisors of Warren county, and the relief asked is that a *mandamus* issue commanding them to perform what is claimed to be an official duty.

A demurrer to the petition was overruled, and defendants

Henry v. Taylor.

electing to stand thereon, a peremptory *mandamus* was ordered to be issued. The defendants appeal.

George Collings, for appellants.

Henderson & Berry, for appellees.

SEEVERS, J.—It is stated in the petition the plaintiffs are electors of Washington township, Warren county, and reside without the incorporated limits of the town of Indianola. That a majority of the electors of said township petitioned the board of supervisors of said county to divide said township into two townships, the one to embrace the territory without, and the other the territory within the corporate limits of said town. That said petition coming on to be heard, the board of supervisors made the following order in reference thereto: “The petition asking that Washington township be divided was not granted for the reason petition did not designate boundaries of the proposed township.” Counsel for appellants say the demurrer raised two question: “First, that the petition upon its face showed the court did not have jurisdiction of the subject-matter;” and counsel further say the questions to be determined are: “did appellants have any discretionary power conferred upon them as contemplated in the latter clause of Code, section 3373.”

It must be conceded the board did act. Therefore that question is out of the way and it only remains to be determined whether the board under the allegations of the petition had any discretion in the premises.

The statute provides: “When any township has within its limits an incorporated city or town, the electors of such city or town may at the January, April, or June session of the board of supervisors of the county, petition to have such township divided into two townships, the one to embrace the territory without, and the other the territory within such corpor-

1. MANDAMUS: board of supervisors.

Henry v. Taylor.

ate limits, which petition shall be accompanied by the affidavit of three individuals to the effect that all the signatures to such petition are genuine and that the signers thereof are legal voters of said township residing outside of said corporate limits." Code, § 382. Section 383 provides that a specified notice of the presentation of the petition shall be given, and section 384 is as follows: "If such petition is signed by a majority of the electors of such township residing without the corporate limits of such city or town, the board of supervisors shall divide such township into two townships as prayed therein * * * ." Code, § 384.

Counsel for the appellants insist the presentation of the petition purporting to be signed by the requisite number of electors accompanied with the proper affidavits and notice makes only a *prima facie* case, and that the board has the power, and should determine as to the residence of the signers to the petition, whether the signatures are genuine, and whether they constitute a majority of the electors residing in that township without the corporate limits of the town. Therefore it follows, it is said, as the defendants had the right to determine said matter, and as they did so, their discretion cannot be controlled in this proceeding. It may be this ordinarily is true, but it is an old and clearly established rule that a demurrer admits all facts which are well pleaded. In addition to what is above set out it is stated in the petition that "said petition came on for hearing before the defendants, the board of supervisors * * * and said board found that the petition was duly signed by a majority of the electors, required notice duly given, and presented at a time when authorized by statute." Here is found, as we think, allegations, not only that all the prerequisites required by law had been complied with, but that the defendants so found, and as said allegations must be regarded as admitted by the demurrer, the defendants, as we think, did not have any discretion in the premises, as

Hart v. Jackson.

the statute provides they "shall divide such township into two townships, as prayed" in the petition.

Counsel for appellants maintain that the court did not have jurisdiction, because the board was vested with a discretion in the premises, and that consent cannot give jurisdiction of the subject-matter, and therefore the admissions made by the demurrer should not be so regarded. This argument is fallacious and necessarily leads to the result that it makes no difference what might be alleged in the petition for the purpose of giving the court jurisdiction, the plaintiffs could always be defeated by a demurrer which raised the jurisdictional question. We hold the court had jurisdiction of the subject-matter, provided the prerequisites had been complied with, and the defendants admit the plaintiffs had done all the statute required. The jurisdiction is therefore complete. The reason given for not granting the prayer cannot, under the statute, be allowed to prevail. It amounts to the same thing as if the relief asked had been simply refused.

AFFIRMED.

HART V. JACKSON.

1. **Practice in Supreme Court.** An amended abstract not denied will be taken as correct.
2. **Trial de novo: CERTIFICATE OF EVIDENCE.** Where the certificate of the judge was that the record contained "all the evidence used on the trial," but failed to show that no other evidence was offered and rejected, it is a certificate of the evidence received only, and is not sufficient to authorize a new trial.

• *Appeal from Henry Circuit Court.*

MONDAY, OCTOBER 24.

ACTION in chancery. There was a decree entered in the court below against the Hawkeye Insurance Co., from which it appeals to this court.

Miller & Godfrey and *Woolson & Babb*, for appellant.

J. & S. K. Tracy and *W. J. Jeffries*, for appellee.

BECK, J.—I. This action is triable in this court *de novo*; counsel on both sides of the case concede this point.

The plaintiff files an amended abstract denying that the record shows it contains all the evidence *offered* and admitted upon the trial. The certificate of the judge identifying the evidence is set out in the amended abstract. It shows that the evidence found in the record before us “was all the evidence *used* on the trial.” It does not purport to set out the evidence *offered* by the respective parties.

II. The amended abstract is not denied by appellant. It must therefore be received as correct without verification by ref-

1. PRACTICE
in supreme
court

erence to the record, under a familiar rule of this court sanctioned by uniform and repeated decisions.

Plaintiff relies for affirming the decree of the court below upon these defects in the record, which he claims, forbid us to consider the evidence presented in the abstract.

III. We have more than once held that the record of causes tried anew in this court must contain all the evidence *offered*

2. TRIAL DE
NOVO :
certificate of
evidence.

and admitted in the court below. This rule is founded upon obvious reasons. We pass upon the admissibility of all testimony. Whatever is offered must be preserved to the end that we may determine the question of its competency. Code, section 2742, requires all evidence offered upon the trial in the court below to be certified to this court. We have accordingly held that when the certificate of the judge fails to show that the record contains all the evidence offered in the case it cannot be tried here *de novo*. *Taylor & Co. v. Kier et al.*, 54 Iowa, 645; *Tuttle v. Story Co.*, 56 Iowa, 316.

IV. It is insisted by defendant's counsel that as the original

Loomis v. McKenzie.

abstract shows evidence offered and excluded it is therefore sufficient, as it does not show that other evidence was excluded.

But the difficulty in defendant's way is, that the record according to the amended abstract, which is not denied by him, fails to show whether there was or was not evidence offered and rejected. It contains only the evidence *used* upon the trial. Defendant's position is to the effect that the original abstract must prevail as against the amended abstract. This is in conflict with reason and repeated decisions. The amended abstract, if not denied, is regarded as presenting the facts contained in the record.

V. The language of the certificate set out in the amended abstract is that the record contains all the evidence "*used*" upon the trial. Evidence admitted is "*used*;" testimony rejected is not "*used*." The certificate therefore identifies only evidence admitted and fails to show that no other evidence was offered.

For these reasons the case cannot be tried in this court, and the decree of the Circuit Court must be

AFFIRMED.

LOOMIS v. MCKENZIE.

57	77
85	17
57	77
86	64

1. **Appeal: NOT PERFECTED: JURISDICTION.** Where, on appeal, the clerk's fees for transcript were not paid or secured, it was held that the appeal was not perfected, and that the court below retained jurisdiction in the cause, and had power to grant a new trial.
2. —: **SUPERSEDEAS BOND.** The supersedeas bond secured the clerk's fees for transcript only in case the judgment was in substance affirmed.
3. —: **ESTOPPEL.** The fact that the clerk ordered the execution returned on service of notice and filing of bond for appeal, did not estop the party from showing the appeal had not been perfected.
4. —: **PROCEDENDO.** Where the Supreme Court assumes jurisdiction to entertain and dismiss an appeal not perfected, and *procedendo* is issued, it would not have the effect to set aside a new trial granted in the meantime by the court below, or to reinstate the judgment.

Loomis v. McKenzie.

5. ———: **NEW TRIAL.** Where the court below having jurisdiction grants a new trial, the order, however erroneous, is not void.
6. ———: **EXECUTION.** Where the order granting a new trial was appealed from and superseded, it will not authorize the issuance of an execution on the judgment.

Appeal from Delaware Circuit Court.

MONDAY, OCTOBER 24.

ACTION in equity to set aside a certain sale under execution of real estate and deeds made by the sheriff in pursuance thereof. The court granted the relief asked in substance, but both parties appeal.

J. M. Brayton, for appellants.

J. B. Powers and Blair & Bronson, for appellee.

SEEVERS, J.—The facts necessary to be stated are: That the defendant McKenzie, obtained a judgment in an equitable action in the District Court against the plaintiff. Thereupon the plaintiff served the requisite notices for an appeal to the Supreme Court, and also filed a supersedeas bond. Afterward, and before the term of the Supreme Court, to which the appeal was returnable, the plaintiff caused a notice to be served that he had withdrawn said appeal, and on the same day commenced an action or special proceeding to vacate said judgment, and for a new trial. The latter was granted, and the defendant McKenzie, appealed to the Supreme Court and filed his supersedeas bond. Afterward, on motion of said McKenzie, the judgment from which plaintiff appealed was affirmed by the Supreme Court on the ground he had failed to prosecute his appeal. Upon a proper showing being made, the judgment of affirmance was set aside. And thereafter the Supreme Court made the following order: "On this day it appearing to the court that after the appeal had been taken the appellant was granted a new trial in the court below, and

Loomis v. McKenzie.

thereupon dismissed his appeal, it is therefore ordered that said appeal be dismissed in this court with costs against appellant, and that execution issue therefor." And the usual *procedendo* in such cases was issued by the clerk of the Supreme Court.

Afterward an execution was issued on the judgment rendered in the action in which a new trial had been granted, and thereunder the real estate sold. To set aside said sale and deeds made in pursuance thereof, is the object of this action.

The real estate was purchased by certain persons who are made defendants. After said sale had been made, the appeal of McKenzie from the order of the court granting a new trial was determined by the Supreme Court, and the same reversed. *Loomis v. McKenzie*, 48 Iowa, 416.

I. A material question is, whether the District Court had jurisdiction of the subject matter at the time the new trial was granted. The judgment having been rendered in an equitable action, it is insisted by the appellees: First, That an appeal by the plaintiff was duly taken and perfected. Second, This being so, the cause had been wholly removed from the court below, and was pending in the Supreme Court; and Third, That a party cannot withdraw or dismiss an appeal to the Supreme Court without the consent of the adverse party. On the other hand, the appellant insists that though an appeal was taken, it never was perfected, and hence, the District Court retained its jurisdiction of the judgment for the purpose, upon the proper showing being made, of granting a new trial. At the time the order of this court was made dismissing the appeal, it was taken for granted the appeal had been perfected. This is true also when the appeal from the order granting the new trial was determined by the Supreme Court. See *Loomis v. McKenzie*, before cited. It now appears that notices of appeal were duly served December 20, 1875, and a supersedeas bond filed at or about the same time, but that the clerk's fees for a transcript were

1. APPEAL:
not perfect-
ed: jurisdic-
tion.

neither paid nor secured, and that on February 17, 1876, the plaintiff caused to be served on McKenzie, a notice that he had withdrawn said appeal and would take no further action therein.

It is provided by statute that "an appeal shall not be perfected until notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript." Code, § 3179.

This statute has been in force for several years, but the question has never been presented to this court what effect the failure or refusal of the appellant to pay the clerk's fees for the transcript has upon the appeal.

The statute seems to contemplate there may be an appeal as distinguished from a perfected appeal, for it is provided an appeal is taken by the service of the requisite notices (Code, § 3178), and then the following section, quoted above, declares when such appeal shall be regarded as having been perfected. There does not seem to be any room for construction in this statute. The language can be readily understood, and it declares in terms that the appeal is not perfected until the fees for the transcript are paid or secured. In a statutory sense, this is just as important and essential as the service of the requisite notices.

We have no occasion to determine the effect of an unperfected appeal further than that it cannot have the effect in and of itself to remove the cause from the jurisdiction of the court below. As the appeal had not been perfected, the appellee had the right to the process of the court to enforce it. This being so, it follows necessarily the court had the power and jurisdiction to refuse such process by granting a new trial.

Whether the appellee can have such an appeal affirmed or dismissed and obtain in this court a judgment on the supersedeas bond is not in this case. Nor is it essential that we should determine whether the appellant can dismiss or with-

draw an appeal not perfected without the consent of the appellee, and this is true as to the question whether the clerk can waive the provision of the statute requiring the appellant to pay or secure the fees for the transcript.

II. The appellees insist the supersedeas bond secured the clerk's fee for the transcript. It was conditioned that the appellant should pay all "costs and damages that shall be adjudged against the appellant on the appeal, and shall also satisfy and perform the said judgment appealed from in case it shall be affirmed, and any judgment or order the Supreme Court may render, or order to be rendered by said District Court." It is evident this bond would secure the clerk's fees only in case the judgment was in substance affirmed. If it should be reversed, the bond would not secure the clerk's fees for the transcript. A supersedeas bond is not essential in perfecting the appeal. *Pratt v. The Western Stage Co.*, 26 Iowa, 241.

III. It is also said, the plaintiff is estopped from now showing the appeal had not been perfected. It is a sufficient answer to this to say the plaintiff never so assented, but, on the contrary, insisted he had withdrawn it. At most, he asserted he had appealed, but, as has been said, the statute contemplates there may be such as distinguished from a perfected appeal.

Conceding the clerk did order an execution to be returned when the notices of appeal were served and the supersedeas bond filed, this should not estop the plaintiff from showing the appeal had not been perfected. The action of the clerk should not prejudice the plaintiff, besides this he was simply mistaken when it became his duty to regard the appeal as having been perfected.

IV. Conceding the Supreme Court had jurisdiction to entertain the appeal and therefore dismiss it, the only effect of this action and the *procedendo* which accordingly issued was to direct the court below to pro-

2. — : supersedeas bond.

3. — : estoppel.

4. — : procedendo.

Loomis v. McKenzie.

ceed as if no appeal had been taken, provided the status of the cause remained the same in said court as when the appeal was taken. If the District Court in the exercise of its appropriate jurisdiction had in the meantime granted a new trial in the action or set aside the judgment, the action of the Supreme Court would not have the effect to reinstate the judgment in full force or set aside the order granting the new trial. No such questions were presented to or determined by the Supreme Court.

V. As the District Court had the jurisdiction and power to grant the new trial, the order, however erroneous it may have been, is not void. Hence, if it be admitted ^{s. —: new trial.} the court did not determine before granting the new trial that there was a valid defense to the action (if this was essential), this at most would be error only. It is also immaterial in this proceeding under what section of the Code the court proceeded, that is under § 2837 or § 3154. The order granting the new trial under either would not be a nullity.

VI. It is insisted as the order granting a new trial had been appealed from and superseded an execution could law- ^{s. —: execution.} fully issue on the judgment. We do not think this position is tenable. The effect of the supersedeas was to prevent the plaintiff from proceeding with the trial of the main action until the question had been determined by the Supreme Court, whether a new trial had been properly granted. At least this is probably so. It may have had the further effect to preserve the liens of the judgment. But clearly we think it did not have the effect to authorize the issuance of an execution on a judgment in an action in which the court had granted a new trial. A supersedeas cannot, we think, have any greater effect than to preserve rights. It does not give any which did not exist at the time it took effect on existing things.

VII. The judgment was not in form set aside or vacated.

Loomis v. McKenzie.

It remained on the records of the court. It had been rendered in an action in which a new trial had been granted. Such a judgment for all purposes relating to its enforcement is a nullity. It would be strange indeed if such a judgment had sufficient vitality to sustain an execution and proceedings thereon.

It is admitted on all hands, we believe, that a purchaser at execution sale must, in order to sustain his title to property purchased thereunder, show a valid judgment and execution. Rorer on Judicial and Execution Sales, § 641.

This being so the sale and deeds were properly set aside and the rights of the purchasers sufficiently protected in the decree.

It is sufficient to say as to the plaintiff's appeal that it must be regarded as abandoned because not argued by counsel.

AFFIRMED ON BOTH APPEALS.

ON REHEARING.

SEEVERS, J.—Conceding the plaintiff did assert in the petition for a new trial he had taken and perfected an appeal, the question is what effect such assertion should have in this action. Such allegation was wholly immaterial. The plaintiff by filing the petition for a new trial claimed, in substance, the court had jurisdiction and the power to grant the relief asked. Instead of so showing the allegation as to the appeal, if true, would have shown the court did not have jurisdiction. The new trial was refused on other grounds and therefore the asserted fact had no effect whatever on that litigation. For this reason and because we do not think any of the defendants relied on the assertion and predicated action thereon, we do not think the plaintiff should be estopped from proving the truth.

The petition for a rehearing is overruled.

Weir v. Day.

57 84
97 686

WEIR v. DAY.

1. **Evidence:** TRIAL DE NOVO. Where the testimony was written out and filed before the final submission of the case, and the judge's certificate was in proper form; *held*, sufficient to entitle appellant to a trial *de novo*.
2. **Fraudulent Conveyance:** GRANTOR AND GRANTEE. To render a conveyance invalid, as between a fraudulent grantor and his grantee, it is not necessary that the fraudulent intent, or knowledge, should be traced to the grantee.
3. —: TORT. A person having a claim for a tort is a creditor, and where the conveyance was made with the intent in part to evade fines and judgments which might be obtained for torts, it renders the conveyance wholly fraudulent.

Appeal from Cerro Gordo Circuit Court.

MONDAY, OCTOBER 24.

ON the 6th day of March 1874, the plaintiff being the owner of certain real estate in Mason City conveyed the same to R. C. Mathews. On the 17th day of the same month Mathews conveyed the same property to the defendant C. H. Day, and on the 9th day of August 1876, Day conveyed to Edwin Hamblin. When the property was conveyed by plaintiff to Mathews the same was encumbered by certain tax-liens mortgages and judgments. These liens were beyond the ability of the plaintiff to pay and he conveyed to Mathews, as is claimed to the end that he, Mathews, should collect the rents and apply the same to the payment of the liens, and afterwards deed the property back to plaintiff or some one else at plaintiff's request. Mathews did not desire to give his time to the undertaking, and through the procurement of the plaintiff, he conveyed the property to the defendant Day. Mathews paid no consideration for the conveyance to him, and he received nothing for his conveyance to Day. Day accepted the conveyance and took possession of part of the

Weir v. Day.

premises and collected the rents therefrom until he conveyed to Hamblin. It is claimed in the petition that the conveyance from plaintiff to Mathews and from Mathews to Day, was intended as a mortgage to secure any advancements which they might make to discharge liens upon the property over and above the rents which should accrue therefrom, and that Day was to reconvey the property to plaintiff upon being paid the money advanced by him, and interest; that Day received a large amount of money as rent, neglected to pay off the liens, and sold and conveyed the property to Hamblin; that defendant is liable to account to the plaintiff for the rents and profits, and purchase-money which he received for said premises. The defendant denies that the deed made by Mathews to him was intended as a mortgage for advances to be made, but claims that the plaintiff was indebted to him in the sum of \$1,300, and that he sold and caused Mathews to convey the property to him absolutely, in consideration of the payment of said debt, and certain other liens upon the property which defendant undertook to, and did, pay.

Defendant further avers that the sale and conveyance of the property was made by the plaintiff with intent on his part to hinder, delay and defraud certain of his creditors and others, who were asserting claims against him, but that the purchase was made by defendant in good faith without any such knowledge of the fraudulent intent and purpose of the plaintiff. Upon a trial by the court it was found that the conveyance was intended as a mortgage to the defendant. An account of the rents and profits and proceeds of the sale from defendant to Hamblin was taken and also an account of the disbursements of the defendant on account of the undertaking, and it was found that the defendant was indebted to plaintiff in the sum of \$2,739.12 for which judgment was rendered. Defendant appeals.

Miller & Cleggett and F. J. Bush, for appellants.

Goodykuntz & Blythe and Brown & Binford, for appellee.

ROTHROCK, J. - I. A question is made as to whether the action is triable anew in this court. It is said that the evidence was not taken down in writing. The record

1. EVIDENCE:
trial de novo. shows that the testimony of some of the witnesses was taken by deposition. At the trial the testimony of other witnesses was taken by a short-hand reporter, and the evidence was transcribed by him, and filed in the cause. The transcript of the evidence was filed before the cause was submitted to the judge for his decision, and was taken by him with the written arguments of counsel and the cause was decided in vacation. The judge made his certificate to the evidence in proper form and in due time. This was a sufficient compliance with the statute to entitle an appellant to a trial *de novo* in this court.

II. If the plaintiff caused the conveyances to be made to the defendant with intent to hinder, delay or defraud his creditors, or any of them, he is not entitled to recover.

2. FRAUDULENT CONVEYANCE: g. author and grantee. *Holliday v. Holliday*, 10 Iowa, 200; 1 Story Eq. Jur., 61; Kerr on Frauds and Mistake, 375; *Stephens v. Harrow*, 26 Iowa, 458. The evidence abundantly shows that such was his intention. Before the conveyance to Mathews an action had been commenced against the plaintiff by one Mary Herron to recover damages in the sum of \$2,000 for the unlawful sale of intoxicating liquors. Afterwards she recovered judgment for damages and cost amounting to \$400. On the day before the conveyance to Mathew, one McMillan had commenced an action of the same character, against the defendant, claiming \$5,000. No recovery was had on the action. There were three indictments pending against the plaintiff, for keeping a gambling-house and a nuisance. Upon these the defendant was afterwards convicted, and fined in the

Weir v. Day.

sum of \$600. There was another action pending against him in which judgment was afterwards rendered for over \$200, and costs. Five witnesses testified upon the trial in substance, that the plaintiff stated to them that he made the conveyance to avoid and defeat the claims made against him, for the unlawful sale of intoxicating liquors.

It appears that the court below, was of the opinion that as it was not shown that Day had knowledge of the fraudulent intent of the plaintiff, the conveyance was not fraudulent; that a fraudulent purpose on the part of the grantor alone is not sufficient; that there must be a like intent or at least a knowledge of the fraudulent intent traced to the grantee. This is undoubtedly the rule where creditors seek to set aside a conveyance as fraudulent. But the ground upon which a fraudulent grantor is precluded from gainsaying the transaction, is that he comes into a court of justice with unclean hands and seeking to take advantage of his own wrong. In *Holliday v. Holliday*, *supra*, the plaintiff purchased real estate, paid for it, and took the title in the name of his wife. After her death he sought to compel the children of the wife to convey to him. It appeared that he procured the conveyance to be made to his wife to place the property beyond the reach of legal process, if he should be prosecuted upon a certain demand which he regarded as unjust. It does not appear that the wife participated in or had any knowledge of the fraudulent intent of her husband.

But it is said that the claims which the plaintiff sought to defeat by the transaction, were not the claims of creditors within the meaning of the law. Whatever may be said as to the
 2 — : tort. indictments, it appears to be settled beyond controversy that a person having a claim for a tort is a creditor. See *Hillard v. McGee*, 4 Bibb., 165; *Jackson v. Myers*, 10 Johns., 425; *Farnsworth v. Bell*, 5 Sneed., 531; *Lary Ford v. Fly*, 7 Humph., 585; *Walradt v. Brown*, 1 Gilman, 397. If the intent was in part to evade fines upon criminal prosecution,

Lash v. Lash.

and also to evade the payment of any judgment which might thereafter be obtained in the civil actions, the conveyance was wholly fraudulent. It cannot be upheld in part, and avoided in part. In our opinion the plaintiff's petition should have been dismissed at his costs.

REVERSED.

LASH V. LASH ET AL.

1. **Descent: INHERITANCE: WILL.** Where a person died intestate without wife or issue, both parents being dead, *held*, under section 2457, Code, that his property never constituted any portion of his father's estate; that the persons inheriting took directly from the intestate; and that the heirs of a deceased sister, cut off by the father's will, inherited, unaffected by the will.

Appeal from Woodbury Circuit Court.

MONDAY, OCTOBER 24.

THE plaintiff Thomas B. Lash, claims to be the owner of an undivided three-fourths of certain land in Woodbury county, and brings this action to quiet his title to the same. The defendants for answer admit that he is the owner of an undivided fraction of the premises, but they deny that his fraction amounts to three-fourths. The defendant William A. Lash, and certain other defendants filed a cross-petition in which they claim to be the owners jointly of an undivided half of the premises, and ask that their title be quieted to the same. The defendant F. C. Hanser, and certain other defendants filed a cross-petition in which they claim to be the owners jointly of one undivided tenth part of the premises, and ask that their title be quieted to the same. The court decreed the plaintiff to be the owner of an undivided six-tenths of the premises, and William A. Lash, and the others joining with him in his cross-petition, the owners jointly of an undivided three-tenths of the premises; and F. C. Hanser, and the others joining with him in his cross-pe-

57	88
97	506
57	88
102	178
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106	306
57	88
121	426

Lash v. Lash.

tion, the owners jointly of an undivided one-tenth of the premises, being the amount claimed by them. The plaintiff and William A. Lash and the others joining with him in his cross-petition appeal, the plaintiff perfecting his appeal first.

Chase & Taylor, for plaintiff, appellant.

J. H. Swan, for defendants, appellants.

Joy & Wright, for appellees.

ADAMS, CH. J.—The question presented calls for the construction of the statute pertaining to the descent of real property. All the parties claim through Isreal G. Lash, who died in 1878, intestate, without wife or issue, and seized of the property in controversy. His parents were Christian and Anna Lash, both of whom died before him.

1. DESCENT :
inheritance :
will.

Where a person dies intestate without issue and both parents are dead, the portion which would have fallen to their share if they had been living, shall be disposed of in the same manner as if they had out-lived the intestate and died in the possession and ownership of the portion thus falling to their share. Code, section 2457. If the intestate's parents had out-lived him each would have taken one-half of his estate. Code, section 2455. One-half of the intestate's estate then would have gone to his mother, Anna Lash, if she had out-lived him, and upon her death it would have gone to the plaintiff, who is her only heir. As to that half there is no controversy. The controversy arises as to the disposition that should be made of the half which would have gone to the intestate's father. He left two children by his first wife, Elizabeth and Philopena, both of whom died, leaving issue. He left three children by his second wife, two of whom died, leaving issue, and one died without issue. He left two children by his third wife, Anna, the plaintiff Thomas B. Lash, and the intestate. He left a will whereby he devised one-third of his property to his wife Anna Lash, who survived him, and the remainder to his children in

Lash v. Lash.

equal shares, except Philopena. To her he gave nothing on account of previous advancements. The plaintiff claims the one-half which would have gone to the mother of himself and the intestate, and about which there is no controversy. He also claims one-third of the one-half which would have gone to his father, because his father devised one-third of his property to his wife, the plaintiff's mother. He also claims one-fourth of the remaining two-thirds of the one-half which would have gone to his father, because he is one of four devisees of his father who have either survived or died leaving issue. The whole amount claimed is three-fourths. The court below gave him six-tenths. As there was no controversy in regard to the one-half which would have gone to the mother, the court must have given him one-fifth of the one-half which would have gone to his father. In doing so the court must have disregarded the father's will, and ignored the fact that the father's wife Anna, survived him. In doing this we think the court did not err. The estate in question never constituted any part of Christian Lash's estate and was therefore never affected by Christian Lash's will. As the estate in question never constituted any part of Christain Lash's estate, no part thereof ever passed from Christian Lash to Anna Lash by inheritance, distribution, or otherwise. Whatever the plaintiff or any other heir of the intestate takes he takes directly from the intestate and not otherwise. Nothing in fact intervenes between the death of the intestate and the transmission of his estate to his heirs. The survivorship of the parents is a fiction. We suppose it to determine the descent. For that purpose we need suppose it as continuing only for an instant. Both parents are to be supposed as then dying in the ownership of the property, which would have gone to them respectively. Neither is to be supposed as taking from the other, because in fact neither has anything which the other can take. It is immaterial which of the parents died first or whether the one which died first died testate or intestate.

Lash v. Lash.

The plaintiff relies upon *Moore v. Weaver*, 53 Iowa, 11. In that case the intestate died without issue and both of his parents had died before him. The father, however, before his death married the plaintiff. It was held that she was entitled to one-third of the one-half which would have gone to the intestate's father. But it is manifest that she did not take from the intestate's father but from the intestate. Under that decision a step-mother inherits from a step-child, or becomes a distributee of his estate, where the father of the child has previously died. If she had died before the intestate although after her husband, the intestate's father, her heirs would have taken nothing through her. She survived both her husband and the intestate. It was thought that under the statute she became distributee. Whether that decision is right or wrong it does not sustain the plaintiff's position.

The defendant William A. Lash and the others joining with him in his cross petition, while admitting that the amount allowed the plaintiff is correct, claim that they are entitled to the remainder, and that nothing should have been allowed to F. C. Hanser and others joining with him in his cross-petition, all heirs of Philopena Lash, deceased. The theory of William A. Lash, and those joining with him, is that as Christian Lash cut off by his will his daughter Philopena from all participation in his estate, her heirs cannot inherit from the intestate, because to do so they must inherit through their mother as well as through her father, Christain Lash, and that would be in contravention of the will. But as we have already seen the heirs of Philopena inherit directly from the intestate.

In our opinion the judgment of the Circuit Court should on both appeals be

AFFIRMED.

JEWELL V. REDDINGTON.

1. **Appeal: WAIVER OF.** Under the facts in this case, it was held that appellant had not waived his right to appeal.
2. **Conveyance: SETTING ASIDE.** A conveyance made upon the consideration of support of parents will be set aside when the evidence shows an abandonment by all the parties of the contract of support.
3. ———: **FINDINGS OF REFEREE: EVIDENCE.** The findings of the referee as to notice to mortgagee considered; *held*, supported by the evidence.
4. **Practice in Supreme Court.** This court will not interfere with the discretion of the trial court, in refusing to recommit the case to the referee to take testimony omitted by inadvertence.

Appeal from Benton Circuit Court.

MONDAY, OCTOBER 24.

THE defendant, John Reddington, was the owner of a farm of about eighty-seven acres, upon which he with his wife resided as their homestead. They were far advanced in age. Their children were grown up and married. Their youngest daughter, Delilah, married Samuel Geiger. On the 27th day of December, 1871, they conveyed their farm by deed of general warranty to their said daughter. On the same day and as part of the same transaction, and as the consideration for said conveyance, the said daughter and her husband entered into a written obligation to keep and maintain the father and mother in a certain specified manner. They also executed to the said Reddington a lease of said farm to continue during the lives of the parents. By the agreement Samuel Geiger and Delilah were to erect a small dwelling-house on the farm near the house then situated thereon for the use of the old people, and both families were thus to reside on the land. The house was erected and the parties undertook to carry out their contract. After a time there arose disagreements and bickerings between them, and in the spring of 1877 Geiger and his wife removed from

Jewell v. Reddington.

the farm permanently and went to another place to reside. After their removal and on the 19th day of January, 1878, the said Delilah executed and delivered a mortgage to the plaintiff upon the farm to secure the payment of \$300 in six months, with interest thereon at ten per cent. Some time after the execution of the mortgage Delilah Geiger died.

This controversy commenced by the plaintiff filing a petition to foreclose the mortgage. He made Samuel Geiger, and the minor children of Delilah Geiger and John Reddington and his wife Sarah Reddington, and certain other parties, defendants. John and Sarah Reddington filed a cross-bill in which they sought to set aside and annul the conveyance from them to Delilah Geiger, on account of failure of the consideration, and alleging that the plaintiff had notice of such failure before the execution of the mortgage. Issue having been joined between the parties last named the cause was referred to Hon. Geo. R. Struble for trial. He recommended to the court that the conveyance should be set aside, and that the plaintiff had notice of its invalidity before he took his mortgage; that he was not entitled to a foreclosure, but that inasmuch as the Geigers had partly performed the contract by keeping the father and mother for several years, he treated the mortgage as an assignment of their claim; and stated an account between them and the father and mother, and found \$177 to be due them, and recommended that the defendants be required to pay that sum to the plaintiff, and that the same should be made a lien upon the farm. He further recommended that each party should pay one-half of the costs. A decree was entered in accord with the report of the referee. The plaintiff appeals.

James E. Jewell, pro ss.

Nichols & Burnham, for appellees.

ROTHROCK, J.—I. A question is made by appellees as to

Jewell v. Reddington.

the right of appellant to prosecute the appeal. It appears that after the decree was entered the appellees paid to the clerk of the court the amount which was awarded against them, including costs. An attorney who was engaged in assisting the plaintiff in the trial of the cause, and had filed a lien for fees, received from the clerk a part of the money so paid. As soon as this was known by plaintiff he repudiated the transaction, and paid to the clerk the amount so withdrawn. Under these facts it is apparent that plaintiff has not waived his appeal.

II. Appellant insists that the conveyance should not have been set aside; that the most appellees can claim is a life-lease or tenancy of the land. The evidence as to where the fault existed, leading to the disagreements between the father and mother and their daughter and son-in-law, is, as usual in such cases, very conflicting. The referees found in substance that each of the contending parties was glad to separate from the other and that the removal of Geiger and wife was intended by all the parties as an abandonment of the whole undertaking, and a relinquishment by them of the contract, including the conveyance of the land. We are not disposed under the evidence to disturb this finding.

III. The referee found that the plaintiff had actual notice of the rights of the defendants in the farm before he took his mortgage. This fact we think is supported by the evidence. In a pleading filed in the case by the plaintiff he admitted that before he took his mortgage he went to said lands to make an examination thereof and found John and Sarah Reddington in possession, claiming under a life-lease. There are other facts in the case which lead us to doubt the validity of the mortgage. It seems that there were two deeds missing from the chain of title, as shown by the record, and that plaintiff took his mortgage with a knowledge of this fact. The transaction was therefore not a straight loan upon a perfect title of record.

IV. It is urged that the statement of the account between the parties is grossly inaccurate. Appellant claims that a fair accounting according to the evidence shows a balance against appellees of \$1,299, instead of \$177. In the account the referee made allowance to the Geigers for permanent improvements on the land. For repairs nothing was allowed. This, we think, is correct. It is claimed that the rent and use of the farm was overestimated by the referee. We have examined the evidence on this question, and all the other matters entering into the account, and without going over the same in detail we conclude that the summing up by the referee is as nearly correct as we can make it, and we are content to adopt it as our own.

V. Appellant claims that he redeemed the land from a tax sale and that he should be allowed the amount paid therefor 4. PRACTICE in supreme court. in addition to what was allowed by the referee. In the original petition for foreclosure a claim is made for taxes paid in redemption of the land. It is claimed that there was no denial of such claim by appellees. An examination of the pleadings leaves the question in some doubt, but we incline to think there was a general denial of the claim. The doubt arises from the fact that in the admissions and denials the counts of the petition are not specifically named. In the trial before the referee no evidence whatever was introduced by anyone upon the right of plaintiff to have taxes refunded. After the report of the referee was filed the plaintiff filed a motion to recommit the case to the referee for the purpose of taking testimony upon this claim. The motion was put upon the ground that the plaintiff by inadvertence omitted to introduce such testimony. The motion was overruled. Whether or not the plaintiff would be entitled under the peculiar facts in this case to be reimbursed for taxes paid we need not determine. There is much in the case leading us to the belief that he ought to have kept himself out of this controversy. Be that as it may, we are not disposed to interfere with the

 Clark v. Haynes.

discretion of the court in refusing to again refer the case. There had been a full trial. The plaintiff did not seek to amend his pleadings. He asked a re-trial upon part of the claim made by him, and the only ground therefor was his own neglect to present the evidence which he had at hand. If new trials and rehearings are to be allowed for such causes, parties will never know when litigation is at an end.

AFFIRMED.

CLARK V. HAYNES.

1. **Landlord and Tenant: ACTION FOR RENT: ATTACHMENT.** An action for rent commenced by ordinary attachment before the rent was due cannot be deemed an action to effect a landlord's lien, and plaintiff takes thereby only such lien as an ordinary attachment gives.

Appeal from Polk Circuit Court.

MONDAY, OCTOBER 24.

ACTION upon a delivery bond executed by the defendant for the purpose of delivering certain property attached in an action in which the present plaintiff was plaintiff and one Shiffer was defendant. The plaintiff avers that he obtained judgment against Shiffer, and demanded of this defendant a return of the property discharged, but that the defendant has wholly failed to return the same.

The defendant for answer avers that at the time of the levy of the attachment Shiffer was not the owner of the property, but that it belonged to himself.

There was a trial without a jury, and judgment was rendered for the plaintiff. The defendant appeals.

Wright & Wright, for appellant.

M. D. McHenry, for appellee.

 Clark v. Haynes.

ADAMS, CH. J.—The court made a finding of facts which was, in substance, as follows: The plaintiff in October, 1878, brought an action in ordinary attachment against Shiffer on a promissory note given for rent, which note was not due. The prayer was that an attachment issue and Shiffer's property be attached. He filed a bond as in ordinary attachment, and a writ was issued and levied upon certain corn grown upon the leased premises. Judgment was recovered against Shiffer for the amount of the note. Prior to the levy of the attachment Shiffer sold the corn to the defendant, and under claim of ownership, the defendant filed the bond in suit, and by reason thereof, the attachment was discharged. The plaintiff never instituted an action to enforce his landlord's lien, except as above stated.

The court found as a conclusion of law that the defendant's purchase was made subject to the plaintiff's lien as landlord, and rendered judgment for the plaintiff for the value of the corn.

Code, section 2998, provides that "in an action brought upon the bond (given for the discharge of attached property) it shall be a sufficient defense that the property for the delivery of which the bond was given did not at the time of the levy belong to the defendant against whom the attachment was issued." The court found the fact which the Code says shall be a sufficient defense, but held that it was not sufficient under the circumstances of the case, because the action was brought for rent, and the corn attached was grown upon the leased premises. In this it appears to us that the court erred. The theory of the court doubtless was that the plaintiff had a landlord's lien; that the lien must have existed before the sale to the defendant; and that the action in ordinary attachment was sufficient to effect the lien.

Code, section 2018, provides that a lien may be effected by the commencement of an action within the period for the rent

Clark v. Haynes.

alone, in which action the landlord will be entitled to a writ of attachment upon filing with the proper clerk an affidavit that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the affidavit. "The time prescribed within which the action must be commenced is the year after a year's rent, or the rent of a shorter period claimed, falls due, and in case the term has expired the action must not be commenced later than six months from the expiration of the term. The action in which the plaintiff's attachment issued was brought before the rent became due. That he was entitled to a general attachment upon making the proper allegation, which we will assume that he did make, no one would deny. But it has been expressly held that an action to effect a landlord's lien cannot be commenced before the rent is due, and that if the landlord needs to aid his lien by preventing a disposition of the property, he must do so by an action in equity for an injunction. *Garner v. Cutting*, 32 Iowa, 552. It appears to us that under that decision the plaintiff's action in attachment could not be deemed an action to effect his lien. It was, doubtless, because of that decision that the plaintiff sought an ordinary attachment against Shiffer's property in general. Having sought and obtained such attachment, the object of which is to create a new lien, and not to render effective one already existing, we think that he can be allowed to take only what such attachment gives him. In *Merritt v. Fisher*, 19 of Iowa, 354, the court, speaking of a landlord's lien, said: "The lien and the remedy thus given to the landlord are purely statutory. It is a species of class-legislation in favor of landlords, granting them rights not given to creditors generally. It follows that in availing himself of this special remedy the landlord must take it just as the statute gives it to him."

In our opinion the court erred in rendering judgment for the plaintiff, and the judgment must be .

REVERSED.

McFaul v. Woodbury County.

, McFAUL v. WOODBURY COUNTY.

1. **Verdict: INDEFINITE: EQUITY.** Where the verdict is indefinite and does not express the true intention of the jury, the mistake or omission being known upon the return of the verdict, a complete and adequate remedy exists at law, and relief therefor cannot be sought in equity.

Appeal from Woodbury District Court.

MONDAY, OCTOBER 24.

ACTION in chancery. Plaintiff's petition was dismissed upon a demurrer thereto; he appeals to this court.

Fawcett & Pardoe, for appellant.

S. M. Marsh, District Attorney, and *Geo. W. Wakefield*, for appellee.

BECK, J.—I. The petition alleges that in a certain action which plaintiff brought against defendant, the jury rendered a sealed verdict in the following form: "We, the jury, find for plaintiff, and assess the amount at \$500, with back interest at six per cent;" that for the reason the jury were not again called together by the court, they were not required to state more definitely their findings; that at the proper time, before the judgment was rendered, plaintiff moved the court to amend the verdict so that it might express the intention of the jury to add to the amount of the principal debt, interest at six per cent from the time payment was demanded to the day of trial; and that judgment for the amount of the verdict, as so amended, be rendered. This motion was overruled. The petition alleges that the jury did intend to allow interest, as expressed in this motion, but, through mistake, the interest was not computed and added to the principal found due by them. The plaintiff for relief prays that a decree be

McFaul v. Woodbury County.

entered against defendant for the amount of the interest. The amount in controversy being less than \$100, the questions involved in the case are certified to this court as required by statute. They involve the correctness of the ruling of the District Court in sustaining the demurrer. In our opinion, that ruling is correct.

II. The plaintiff had a complete and adequate remedy at law, by motion to reform the verdict, so that it should express the true intention of the jury, if such intention appeared in the verdict considered in connection with the record in the case. This remedy plaintiff pursued. Or in case the intention of the jury could not be made to appear, the plaintiff was entitled to have had the verdict set aside upon motion. The omission or mistake of the jury was well known to the plaintiff upon the return of the verdict. At that time he sought for relief by motion. If the court erred in refusing it, the decision could have been reviewed upon appeal. Relief cannot be sought in chancery when so plain a remedy exists at law.

The case differs from *Patridge & Co. v. Harrow et al.*, 27 Iowa, 96; *Barthell v. Roderick*, 34 Iowa, 517; *Snyder v. Ives*, 42 Iowa, 157. In these cases the mistakes were not discovered until it was too late to correct them by motion.

The decree of the District Court is

AFFIRMED.

Young v. McWald.

YOUNG v. McWald.

1. **Appeal:** AMOUNT IN CONTROVERSY. Where, before the trial in a justice's court, a certain amount was tendered but not accepted, and trial was had; *Held*, that the portion of the claim not tendered was the amount in controversy under the law limiting appeals.
2. **Tender.** A tender made after suit was brought, specifying that a certain portion of the amount paid into court was to be applied to the debt and the balance to the costs, is proper and not conditional.

Appeal from Cass Circuit Court.

MONDAY, OCTOBER 24.

ACTION originally brought before a justice. Upon an appeal to the Circuit Court there was a judgment for plaintiff. Defendant appeals to this court.

Chapman & Chapman, for appellant.

L. L. DeLano, for appellee.

BECK, J.—I. The plaintiff brought this action before a justice of the peace to recover \$78.80 "for corn sold and delivered to defendant." On the return day the defendant tendered and paid to the justice "\$49.41, as the amount of the debt, and for the further sum of \$10.05 as costs, being all the costs in the cause up to the time of the tender." The tender not being accepted, there was a trial before the justice, and judgment was rendered for plaintiff in the amount of the sum tendered, and against him for all costs made after the tender. The plaintiff appealed to the Circuit Court, where defendant moved to dismiss the appeal, on the ground that the court had no jurisdiction of the appeal, the amount in controversy being less than \$25. The judge of the Circuit Court certified the questions in this case, thus authorizing an appeal to this court. These questions involve the correctness of the Circuit Court's action in overruling the motion to dismiss the appeal.

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e127 879

 Young v. McWald.

II. Chapter 163, acts Eighteenth General Assembly, provides that no appeal (from a justice of the peace) shall be allowed in any case where the amount in controversy does not exceed twenty-five dollars. See Miller's Code, § 3575.

What was the amount in controversy in this case when the appeal was taken? It is evident that the amount in controversy at that time must determine whether the appeal is allowable. The pleadings may be so amended as that when judgment is rendered the issues may change the amount in controversy, so that it will not be the same as the prior pleadings showed. Thus plaintiff may have set out in his original claim two causes of action. At the trial one may have been withdrawn by the plaintiff, or it may have been admitted by defendant. The amount in controversy afterwards would be the claim contested by the parties.

The case before us is of this character. Defendant's tender admitted plaintiff's claim to the amount of the money paid into court. There is no controversy as to this sum. It is admitted on all hands plaintiff is entitled to recover the money tendered. There is no dispute, no controversy, about that amount. But there is a controversy whether plaintiff shall recover the part of his claim not tendered. The amount of the claim not tendered is, therefore, the amount in controversy in this action. It is less than twenty-five dollars and no appeal was, therefore, allowable in this case.

III. Counsel for plaintiff insists that the tender as made was conditional, and was therefore not good. The language of the record reciting the tender we have above quoted. We are able to discover therefrom no condition attached to the tender. The record simply expresses that a specified portion of the sum of money paid as a tender is to be applied to the debt, and the balance to the costs. This was proper for the law requires when a tender is made after suit has been brought that the costs must be covered by the tender. *Barnes v. Green*, 30 Iowa 114.

The State v. Vall.

The tender, as shown by the record, covered the costs made up to the day of tender. The balance of the money paid into court was to be applied upon the debt.

In our opinion, the Circuit Court erred in overruling the motion to dismiss the appeal.

REVERSED.

THE STATE V. VAIL.

57	108
99	404
57	103
103	230

1. **Criminal Law:** DISCHARGE OF DEFENDANT: COSTS ON APPEAL. A prosecution under a city ordinance, enacted by authority of the State law, the violation of which is punishable by fine and imprisonment, is a criminal proceeding, and an acquittal on appeal in the District Court is an end of the defendant's liability.

Appeal from Hardin District Court.

MONDAY, OCTOBER 24.

THE defendant was arrested upon an information charging him with the sale of ale, beer, porter, and mixed liquors, contrary to the statutes of Iowa, and the ordinances of the incorporated town of Eldora. Upon a trial before a justice of the peace, he was adjudged guilty. He appealed to the District Court, where he was tried and acquitted upon the ground that the ordinance of the town of Eldora, under which the prosecution was had, was not legally enacted. The State appealed to this court, and the judgment of the District Court was reversed. The costs in this court were taxed to the defendant. He now moves to re-tax the costs and relieve him from the payment thereof.

H. L. Huff, for defendant.

Smith McPherson, Attorney General, for the State.

ROTHBROOK, J.—The ordinance under which the defendant

The State v. Vall.

was prosecuted provided that its violation should be punishable by a fine of not less than five dollars, nor more than fifty dollars, and in default of payment, imprisonment in jail, not exceeding thirty days.

1. CRIMINAL
law: dis-
charge of de-
fendant:
costs on ap-
peal.

This and many other ordinances of cities throughout the State make the offenses which they prohibit criminal in their nature and punishable by fine and imprisonment. The law provides that where the defendant in a criminal case is acquitted of the charge in the District Court, the State may appeal, but this court cannot reverse the judgment or so modify it as to increase the punishment. Code, § 4539; and see *State v. Kinney*, 44 Iowa, 414. In a criminal case, then, where there is an acquittal in the District Court, and the defendant is discharged, the discharge is an end of the case so far as he is concerned. The appeal is a matter of no moment to him, and indeed, in many criminal cases where the State appeals, the defendant does not appear in this court. Such was the case in the present instance. See 53 Iowa, 550.

It only remains to be determined whether or not this was a criminal proceeding. It appears to us that where authority is given to a municipal corporation to pass ordinances, the violation of which is punishable with fine, or fines and imprisonment, the proceedings thereunder are necessarily criminal proceedings. See *Jaquith v. Royce*, 42 Iowa, 406. All of the proceedings in the District Court upon appeal are the same, as upon appeals from the judgments of the justices of the peace under the criminal laws of the State. Now, when the State has delegated authority to a municipal corporation to enact ordinances for the punishment of offenses as crimes, the proceedings are criminal, and an acquittal upon appeal to the District Court is an end of the defendant's liability. The motion to re-tax costs will be sustained.

First National Bank of Bellaire, Ohio, v. Mason & Co.

FIRST NATIONAL BANK OF BELLAIRE, OHIO, v. MASON & CO.

1. **Verification: SUFFICIENCY OF.** Where in an action by an indorsee upon an acceptance drawn by a company, the verification was made by the secretary, who was also a member of such company, and showed affiant was familiar with the transactions, it is sufficient.

Appeal from Polk Circuit Court.

MONDAY, OCTOBER 24.

ACTION upon a written acceptance of a draft drawn by the Buckeye Lantern Company, and indorsed to the plaintiff.

There was an answer denying the signature of the defendants to the acceptance of the draft, and denying that the plaintiff was the owner thereof. Two counter-claims were also pleaded which it was alleged arose out of transactions with the Lantern Company, and it was averred that the draft was transferred to the plaintiff subsequent to the maturity of the acceptance. These pleadings were properly verified. The plaintiff filed a reply in general denial of the counter-claims. A motion was made to strike the reply because not properly verified. The motion was overruled. Defendants appeal.

Clark & Park, for appellants.

D. F. Witter and John Mitchell, for appellee.

ROTHROCK, J.—The draft sued on was in the usual form and payable forty-five days after date. It was signed "Buckeye Lantern Company, E. F. Cash, secretary." It was indorsed as follows "Pay to the order of First National Bank, Bellaire, Ohio, E. F. Cash, secretary."

1. VERIFICATION: sufficiency of. "STATE OF OHIO, } ss.
Belmont Co., }

"I, E. F. Cash, being duly sworn, depose and say, that I am secretary and a member of the Buckeye Lantern Co., of Bellaire, Ohio, and as such, I am familiar with all transactions between said company and the defendants herein, since the

First National Bank of Bellaire, Ohio, v. Mason & Co.

beginning of 1879 up to the present time. And I further state that I have read the foregoing reply of the First National Bank of Bellaire, Ohio, and the same is true as I verily believe.

E. F. CASH, *Secretary.*"

It is urged by counsel for appellant that this verification is insufficient, because it does not show that the affiant knew the fact as to whether the draft was transferred before or after maturity. Section 2673 of the Code provides that if the statements of a pleading are known to any person other than the party, such person may make the affidavit, which shall contain averments showing affiant competent to make the same.

It is insisted that although the record shows that Cash was secretary of the Lantern Company, and signed the draft and indorsed it, there is no showing that he knew when it was indorsed, because the statute requires the averment of knowledge of the facts to be made in the affidavit. This appears to us to be rather a technical objection to the affidavit of verification. As the law does not require that the affidavit shall be certain to a certain intent in every particular, we think it sufficient if it shows that the affiant was possessed of the requisite knowledge of the facts to make the verification to the general denial contained in the reply. It shows that he was a member of the Lantern Company, and its secretary. True it is not stated in terms that he was such member and secretary when the draft was drawn and indorsed. But he states that as such member and secretary he is familiar with the transactions between said company and the defendant. This familiarity with the business of the company must have been because he was a member thereof and secretary when the business was transacted, and we think it not an unwarrantable presumption to hold that his official connection with the company was sufficient to authorize him to make the verification.

II. This disposition of the case renders it unnecessary to dispose of the motion filed by appellee and submitted with the cause.

AFFIRMED.

 Logan v. Maytag.

LOGAN V. MAYTAG.

57	107
108	45

1. **Evidence: IMMATERIAL: HEARSAY: NOT RESPONSIVE.** Certain evidence in this case considered; *held*, improperly admitted, it being immaterial and hearsay; also, that other evidence stricken out as not responsive, was responsive and material.
2. **Malicious Prosecution: ADVICE OF COUNSEL.** Before the defendant in an action for malicious prosecution can shield himself, under the advice of counsel, he must show that in good faith he stated the facts fully to his attorney.

Appeal from Marshall District Court.

MONDAY, OCTOBER 24.

THE petition states the defendant "with malice toward plaintiff and for the purpose of compelling him to remove from the house in which he was living, and from the farm on which said house is situated, and without probable cause," filed an information before a justice of the peace, charging that the plaintiff stole one bushel of corn belonging to the defendant; that plaintiff was tried and acquitted of said charge. There was a general denial, trial by jury, verdict and judgment for the plaintiff. The defendant appeals.

Brown & Binford, for appellant.*P. W. Sutton*, for appellee.

SKEEVERS, J.—I. The plaintiff was the tenant of the defendant, in possession of certain premises, and the theory of the former on the trial was the defendant determined

1. **EVIDENCE:**
 immaterial. plaintiff should leave said premises, and for the purpose of effectuating this object, the criminal prosecution was commenced, and that in so doing he was actuated by express malice. For the purpose of establishing such theory, the plaintiff proved by one Schnell that his brother went to the plaintiff for the purpose of buying him out, and asked said witness the following question: "Do you know of Maytag's requesting him to go." The witness answered: "I don't

Logan v. Maytag.

know if Mr. Maytag did, or who did * *. I suppose Maytag knew it. My brother did not take the place at all." Thereupon the defendant moved the court to strike out the "testimony of this witness as to this point." The motion was overruled. It should have been sustained. The evidence was material only for the purpose of showing the brother of the witness was the agent of the defendant, or had been solicited by the latter to purchase the lease of the defendant. But it was not shown the defendant had anything to do with the matter. For aught that appears the brother of the witness acted entirely on his own motion. It was therefore immaterial what he did or said.

II. The same witness testified he was present at the trial before the justice of the peace, and from the two abstracts the following appears to have occurred:
— : hear-
say. The plaintiff asked the witness what was "said there about Mr. Logan's 'moving away,' or 'skipping out,' or 'anything of the kind.'" The witness answered: "Well, Mr. Logan was there; they gave him his freedom. They talked among themselves. I don't know who said it, that he would 'never appear,' and 'skip out.' I believe Maytag was there. I ain't certain, but believe he was there. Mr. Maytag didn't say it, but somebody did. I wouldn't swear that Maytag said it." The defendant moved the court to strike out the evidence "as to leaving, or skipping out, because hearsay." The motion was overruled. Counsel for the appellee maintains the evidence was proper and material for the purpose of showing the object of the plaintiff was to get defendant to leave the farm by the institution of the criminal action. But the difficulty is the evidence was clearly hearsay, and, therefore, should have been excluded, unless the defendant was present at the time, and it was his duty, under the circumstances, to speak. At least this may be so, but the evidence fails to show, if present, he heard what was said.

III. The plaintiff gave evidence tending to show the de-

Logan v. Maytag.

defendant said at the time of the trial before the justice, or after the verdict was rendered "that he would get Mr. Logan off his place or have him in jail." When Mr. Snelling, a witness for the defendant, was on the stand he was asked: "You may state, if you were present during the trial, whether Mr. Maytag made any threats about getting Mr. Logan in jail, or getting him off the place, or anything of the kind." The witness answered: "I was present during the trial, and I heard no such threats made by Mr. Maytag." On motion of the plaintiff, the evidence was struck out, because not responsive. In this we think the court erred. The evidence, in our opinion, was not only responsive to the question, but material in view of the evidence introduced by the plaintiff, because it was contradictory thereto.

Counsel for the appellee insists, if it be conceded the evidence should not have been excluded, it was error without prejudice, because evidence of the same character was afterward given by the same witness. The witness afterward testified in substance that defendant said "he would get him (plaintiff) in jail, if he did not quit stealing his corn." This is materially different from the evidence stricken out, and, also, that which the plaintiff sought to contradict.

IV. The motion for judgment on the special verdict was correctly overruled, because it was not sufficiently full and explicit to entitle the defendant to judgment. Before a person can shield himself in a case of this character under the advice of an attorney, he must state, in good faith, the facts fully to his attorney. The special verdict fails to show the plaintiff did so.

We do not understand any objections are urged to the instructions, except that it is said the court erred in submitting the question of probable cause to the jury. In this we do not concur. And in view of the fact, there must be another trial, we deem it improper to discuss this or the question whether the evidence was sufficient to sustain the verdict.

REVERSED.

2. MALICIOUS
prosecution:
advice of
counsel.

THAYER V. COLDREN ET AL.

1. **Conveyance: CONSIDERATION.** Evidence considered; *held*, to show a sufficient consideration, and that the conveyance was made in good faith.
2. **Execution Sale: REDEMPTION.** By attempting to redeem from an execution sale, a party admits the validity of such sale, and that the land was subject to the judgment.
3. ———: **RIGHT OF REDEMPTION: VENDEE OF DEFENDANT.** The vendee of an execution defendant, whose lands are sold at execution sale, may redeem the lands to which he holds title from such sale, although the judgment defendant may have appealed the case.
4. ———: **DEFENDANT.** The term "defendant" as first used in section 3102, Code, means the person holding the right to the possession of the lands sold, as the owner; as last used, it means the defendant in the action.

Appeal from Johnson District Court.

MONDAY, OCTOBER 24.

ACTION in chancery to quiet the title to lands. There was a decree granting the relief prayed for by plaintiff. Defendants appeal.

Milton Remley, for appellants.

Boal & Jackson, for appellee.

BECK, J.—I. We will first briefly state the chain of title of the respective parties claiming the land in controversy as it appears of record.

One Lenox is the common source of the conflicting titles. He conveyed to Landt, who executed a mortgage to secure the payment of the purchase-money, which was subsequently foreclosed, and the land under the foreclosure was sold to Henckley, who conveyed it by warranty deed, dated March 15, 1877, and recorded August 28, 1877, to plaintiff.

The adverse title set up by defendants is as follows: The

57 110
88 466
57 110
93 690
57 110
6114 25
57 110
122 324
57 110
6133 183

Thayer v. Coldren.

property was attached in an action at the suit of defendant Schoonover, receiver, and judgment finally rendered thereon against Henckley. The attachment was prior to the date of the recording of the deed of Henckley to the plaintiff and the judgment was subsequent thereto. Upon this judgment the land was sold to H. M. Remley, May 18, 1878, who subsequently conveyed it to defendant Shaw. The sheriff's deed was executed on the day of the sale to Remley. Henckley had appealed the case wherein the judgment was rendered, upon which the land was sold; upon this fact it is claimed that the sheriff's sale was without redemption.

(Other facts relied upon to support the respective adverse titles of the parties are as follows:

Henckley and three others entered into a contract under which they agreed to acquire lands by gift or purchase, for the purpose of laying out towns along the line of the Chicago, Omaha & St. Joseph Railroad. The land in controversy, it was agreed, should be within the contract. It had been purchased by Henckley and the title was held by Landt. Henckley transferred his interest in this contract to plaintiff and subsequently conveyed to her all the lands.

II. Defendants insist that this conveyance was without consideration and fraudulent. We think the testimony does

1. CONVEY-
ANCE: con-
sideration.

not support this position. All the testimony upon the subject is one way, tending to show that Henckley was indebted to the husband of plaintiff and discharged the debt, or a part of it, by transferring the land to plaintiff. We think that the testimony plainly shows a sufficient consideration received by Henckley and that the conveyance was in good faith.

III. Counsel for the respective parties devote considerable time to discussing the effect of the contract above referred to, under which the land was to be held for town purposes. Under the view we take of the case this contract becomes wholly immaterial for the proper determination of the case. If, as de-

 Thayer v. Coldren.

defendants claim, the contract was abandoned, and was never operative, the legal title is shown to have been in Henckley and passed to plaintiff, where it now rests, unless defeated by defendant Shaw's adverse claim. On the other hand if the contract was operative and the land is within its provisions, Henckley held it in trust for his associates. His transfer to plaintiff under the facts of the case could not have defeated that trust and it is held by plaintiff subject thereto. Or if this view be not correct, Henckley held the legal title which he transferred to plaintiff. The defendants are not claiming under the trust, but upon an adverse legal title. Whether the lands in the hands of plaintiff is subject to that trust is not a matter for determination in this action. We are called upon to determine which of the contesting parties holds the legal title. We have nothing to do with the equities of other persons in the land.

IV. Having found that the conveyance to plaintiff by Henckley was made in good faith and for a sufficient consideration, and that it passes the legal title, unless defeated by defendants' adverse title, we are relieved of the duty of following counsel in their discussion relating to the effect of the contract referred to and the equities of other persons. We are to enquire which of the parties holds the legal title, plaintiff or defendant Shaw. Other facts not before mentioned must be here stated.

The sheriff's sale under which Shaw claims title was made May 18, 1878. On the 14th day of February, 1879, plaintiff deposited with the clerk of the court an amount sufficient to redeem the land from the sale. It will be remembered that the deed was made upon the day of sale, and the right of redemption denied on the ground that defendant Henckley had appealed the case wherein judgment was rendered to the Supreme Court.

Plaintiff having made the deposit of money to redeem the land, cannot set up an equity under the original contract for

the acquisition of town property to defeat the sale. By her effort to redeem from the sale she admits that it was valid, and that the land was subject to the judgment against Henckley. We are, therefore, relieved of the duty of considering her claim that the land was not subject to sale upon the judgment.

We now reach a point where it appears that the case turns wholly upon the question involving plaintiff's right to redeem.

2. ———: If she possessed that right, the sheriff's deed was
right of re- redemption: prematurely made, and therefore invalid, for she
vendee of defendant. did actually make the redemption within the time prescribed by statute. We will, for the sake of perspicuity, repeat facts involved in the question of redemption.

The judgment upon which the sale was made was rendered after Henckley acquired the legal title to the lands under the foreclosure. The deed was made after the attachment and recorded after the judgment was rendered in the case, and the redemption was made within nine months after the sale of the lands. Henckley appealed from the judgment, which was affirmed. Under these facts, did plaintiff have the right of redemption? If such right exists it must be planted upon the statute. There is no provision expressly authorizing the vendee of an execution defendant to redeem from a sheriff's sale. Such right is conferred upon the defendant, judgment creditors, and mortgagees in express language by the statute. Unless by construction of the statute the right of redemption is secured to the vendee of the execution defendant, we will find the astonishing result that the right of redemption is secured to the lien-holder, while it is denied to the vendee of the judgment debtor, the holder of the title. We think, however, that the right of redemption is secured to the vendee of the judgment defendant by a fair interpretation of Code, section 3102; which is in the following language:

"The defendant may redeem real property at any time within one year from the day of sale as herein provided, and will in

 Thayer v. Coldren.

the meantime be entitled to the possession of the property. But in no action where the defendant has taken an appeal from the Circuit or District Court, or stayed execution on the judgment, shall he be entitled to redeem."

This provision secures not only the right of redemption, but the possession of the property sold until a deed be made to the person described by the term "defendant." There was no intention in the mind of the law-maker to secure the possession to one not holding the right thereto at the time of the sale. If the land was in possession of the vendee of the execution defendant, surely the intention could not have been to give the defendant the right of possession until the deed should have been made. The term "defendant," in the first sentence of the section, must, therefore, be understood as describing the person holding the right to the possession as the owner of the land. The vendee of the execution defendant is described by the term as well as defendant in execution himself, in case he had not conveyed the land. Under this provision we think the right of redemption is secured to the vendee of the execution defendant.

The last sentence of the section provides that when the defendant has taken an appeal he cannot redeem. The person here referred to and described as the "defendant," is the party to the suit, not the vendee of the "defendant" for he cannot appeal the case. The provision, therefore, is intended to take the right of redemption from the defendant who could appeal, and not from his vendee who could not. The law will never impose restriction upon the rights of one man on account of the acts of another. This is surely so when the first is in no manner responsible for the acts of the last. We reach the conclusion that plaintiff as the vendee of Henckley was entitled to redeem, and that the sheriff's deed made on the day of sale, being premature, was void. These views find some support in *Harvey v. Spalding*, 16 Iowa, 398, and *Seiben v. Becker et al.*, 53 Iowa, 24. The re-

Rice v. Kelso.

redemption actually made by plaintiff operated to discharge the land from liability upon the judgment. As the sheriff's deed was void, defendant Shaw, though an innocent purchaser, acquired no title under it. These conclusions support the decree of the court below, which quiets the title in plaintiffs. It is therefore

AFFIRMED.

RICE V. KELSO.

1. **Mortgage: JUDGMENT LIENS: AFTER ACQUIRED TITLE.** A mortgage of lands not owned by the mortgagor, will attach and become a lien thereon, there being no intervening equities, the moment the mortgagor acquires title to the land, and it cannot be divested by, or rendered subordinate to, the lien of subsequent judgments.
2. —: —. Holders of judgment liens, not made parties in the foreclosure of a superior mortgage, have their right of redemption, but cannot acquire titles under execution sales that will defeat the mortgage title.

Appeal from Franklin Circuit Court.

TUESDAY, OCTOBER 25.

ACTION to recover the possession of and quiet the title to certain lands. The defendant set up an adverse title, and prayed that it be quieted in him. There was a decree granting to defendant the relief sought in his cross-petition. Plaintiff appeals.

McKinzie & Hemenway, for appellant.*Fred Gilman*, for appellee.

BECK, J.—I. The conflicting titles to the lands in controversy, held by the respective parties, are each traced to Catharine McMannis. Plaintiff claims under a sheriff's deed executed upon a sale had on a decree of foreclosure of a mortgage executed by Catharine McMannis. Defendant's title is

87	115
84	25
57	115
97	489
398	27
57	115
115	128
57	115
135	625

based upon sheriffs' sales and deeds under judgments against her. The facts relating to these conflicting titles, so far as it is necessary to state them, are as follows:

AS TO PLAINTIFF'S TITLE.

1. Catharine McMannis executed to plaintiff March 27, 1873, a mortgage upon the land in controversy, and it was filed for record the 31st day of the same month. This mortgage purports to be executed by Catharine McMannis, both in her own right and as executrix of the estate of James W. McMannis. It contains general covenants of warranty as well as covenants of seizin and against incumbrances.

2. An action to foreclose the mortgage making Catharine McMannis the only defendant resulted in a decree of foreclosure rendered February 12, 1875. A personal judgment was rendered against Catharine McMannis, but the decree provides that execution shall issue against the estate of J. W. McMannis for any balance that may remain after the sale of the property mortgaged. On the 20th of May, 1876, the land was sold upon this decree and a sheriff's deed to the plaintiff was executed therefor July 10, 1878.

3. William M. McMannis conveyed the land by quitclaim deed to Catharine McMannis October 25, 1873. It was admitted that William M. McMannis owned the land by inheritance from James W. McMannis.

4. It is not shown that Catharine had authority conferred upon her as executrix of J. W. McMannis to execute the mortgage to plaintiff.

AS TO DEFENDANT'S TITLE.

Defendant's sheriffs' deeds were made September 2, 1877, upon sales had September 2, 1876, under judgments against Catharine McMannis, the oldest of which was rendered February 23, 1874; the other judgments subsequently became liens.

It will be observed that Catharine acquired the title to the

Rice v. Kelso.

land before the judgments under which defendant claims were recovered. The mortgage under which plaintiff claims was executed before she acquired the title. It is not claimed that the mortgage was effective as a conveyance by her as executrix, nor is it denied that it would have been operative to create a lien upon the land had she owned the land when it was executed. But it is denied that, as the land was afterwards acquired, the mortgage operated as a lien when the title passed to Catharine. Right here is the point of dispute. Defendant insists that the mortgage is not a lien upon the land for the reason that it was acquired after the mortgage was executed. Plaintiff maintains that the mortgage lien attached when the title of the land was vested in Catharine. We think the question involved in the case is one of no great difficulty and may be determined by the application of familiar principles of the law.

II. The mortgage executed by Catharine binds her personally by the covenants it contains. It of course did not operate

as a lien upon the lands before she acquired the title. Now, as between her and the mortgagee, if the rights of others did not intervene, there can be no doubt that the mortgage would attach at the moment she acquired the title. No court could hear her deny the validity of the mortgage. If there were no subsequent grantee or lienholders, or others having adverse interests, the mortgagee could enforce the mortgage against the land, and this right attached the moment the mortgagor acquired the title to the land. At that time the record shows the judgments under which defendant claims had not been rendered, or were not liens. The oldest of the judgments did not become a lien for about ten months after the mortgage was executed. If the mortgage was a valid lien upon the land for ten months it could not have been divested by subsequent judgments or made subordinate thereto.

The lien of a judgment is upon the interest of the defendant in the lands. It is not controlled by the legal but by equitable

Rice v. Kelso.

title. It will reach an equity in lands held by the defendant, or if the defendant holds the legal title and the equity is elsewhere the lien does not operate upon the land. In enforcing judgment liens the law looks for the equitable interest in the lands. If the defendant have not such interest and holds the legal title the lien does not attach; if he have such interest and another holds the legal title the lien will attach. These are familiar doctrines of this court.

. Now when the oldest of the judgments under which defendant claims were rendered, the mortgage under which plaintiff claims had, in equity at least, attached to the land as between the mortgagor and the mortgagee. Defendant can urge no equity arising under the judgments that will displace the equity of the mortgagee. We conclude, therefore, that the mortgage lien, under which plaintiff claims, is prior to the judgments upon which defendant's title is based.

Code, Sec. 1931, provides that a deed conveying an interest not held by the grantor will operate to pass it, when it is subsequently acquired. We know of no reason why this provision should not be held to extend to mortgages where there is no intervening equity. It is in accord with the rule of equity just stated, upon which the decision of the case may be well rested.

III. When the mortgage was foreclosed the judgments under which defendant claims were liens upon the land, inferior, however, to plaintiff's mortgage. The holders of these liens were not made parties to the foreclosure proceedings and their right of redemption was not therefore foreclosed. That right could have been enforced. Whether it has been lost we need not now determine. We are well satisfied that defendant has not acquired a title under the execution sales which will defeat plaintiff's title.

The judgment of the Circuit Court is

REVERSED.

ON REHEARING.

BROOK, J.—I. At a former term a rehearing was granted in this case upon the petition of defendant. This order was made, not so much because we doubted the correctness of the conclusion reached in the foregoing opinion, as for the reason that defendant's counsel insists that our decision is in conflict with authorities cited in his argument and again urged upon our attention in the petition for rehearing. The authorities thus brought to our attention are as follows: *Kreichbaum v. Milton*, 49 Cal., 50; *Goodenow v. Ewer*, 16 Cal., 463; *Bellock v. Rogers, Adm'r*, 9 Cal., 123; *McMillan v. Richards*, Id., 365; *San Francisco v. Lawton*, 18 Cal., 465; *Shaw v. Heisey*, 48 Iowa, 468.

We did not refer to these cases in the foregoing opinion for the reason that they gave no support whatever to the positions of defendant's counsel. We are not expected to present statements of the facts, arguments, and decisions of cases which do not support the points to which they are cited. It is not necessary now to make further mention of these authorities than to say that we have again examined them and find that our first conclusion as to their effect is correct.

II. The following authorities support the conclusions we reached in this case: *Jones on Mortgages*, Secs. 1656, 679; *San Francisco v. Lawton*, 18 Cal., 465 (474); *Clark v. Baker*, 14 Cal., 612; *Gochenour v. Mowry*, 33 Ill., 331; *Wark v. Willard*, 13 N. H., 389.

III. The mortgage, under which plaintiff claims, attached to the land when the mortgagor acquired title. From that moment it became a lien. This was before the judgments, under which defendant claims, became liens.

But counsel for defendant insist that the record did not impart notice as against those who hold under the judgment for the reason that the mortgage was executed before the mortgagor acquired title. The trouble with this position is that

Rice v. Kelso.

under the decision of this court an unrecorded mortgage will hold against a subsequent judgment. See cases cited in 1 Withrow & Stiles' Dig, pp 262-3, Secs. 194, 203, 204.

IV. Counsel for defendant insists that the property in question was not bound by the foreclosure for the reason that the decree does not expressly provide that after acquired title is subject thereto, such relief was not sought in the petition for foreclosure. The mortgage and foreclosure proceedings bound the land. Questions as to the title relate to the evidence required to show that the land is subject to the mortgage, and it was not necessary that they should be referred to in the decree. It is too late now to inquire whether they were properly presented in the pleadings in the foreclosure case. The authorities cited by defendant on this point fail to support his position.

V. Counsel for defendant complain in the petition for a rehearing that our former opinion erroneously states the several dates of the judgments under which defendant claims. The ultimate facts in regard to the dates which we expressed is that the title was acquired by the mortgagor before the judgments became liens. This is stated in the abstract and four several times admitted in the printed argument of defendant's counsel, that is, the dates when judgments became liens are stated to be after the date as given by defendant's counsel in his argument when the mortgagor acquired title. We were, therefore, surely authorized to make the statements complained of, and are justified in expressing surprise that counsel should complain of a statement based upon so many declarations of his own.

Counsel now relies upon the recitals of the sheriff's deeds executed under the judgments as to these dates. The deeds are found in an amended abstract filed by defendant which, of course, was before counsel when he made the statement in his printed arguments as to the dates in question above referred to. We were authorized to presume that counsel did not re-

Getchell v. Benedict.

gard the amended as contradicting the original abstract for the reason that he followed in his statement the latter. But the discrepancy in the dates in question is readily explained. The judgments, or some of them, were rendered before a justice of the peace, and were filed in the office of the clerk of the Circuit Court, in order to create a lien on real estate. The abstract, counsel's argument, and our opinion all state the date of filing of the judgments in the clerk's office as the day they became liens. The recitals in the sheriff's deeds mistakenly give the dates of the judgments as the dates of filing. The petition for rehearing demands no further attention. We adhere to our first opinion, ordering the judgment of the court below to be

REVERSED.

GETCHELL ET AL. V. BENEDIOT.

1. **Street: DEDICATION IN PAIS: CITY PLAT.** Where a party has dedicated land, by acts *in pais*, for a public street, and the public has accepted the dedication and acquired a right thereto, he cannot defeat that right by subsequently filing a city plat, covering a portion of the same land.
2. —: —: **EVIDENCE OF.** Declarations by a person in possession of land and holding an estate upon condition therein, of an intention to dedicate, coupled with subsequent acts of dedication, when the land reverted to him, tend to establish the *animus dedicandi*, and are proper testimony.
3. —: —: **RECORDS: TAXATION.** Where land has been dedicated *in pais*, and continuously used as a highway, the facts that the county and city records all fail to show the existence of the highway, and that the land has been taxed, will not defeat the dedication or destroy the easement which the public holds therein.
4. —: —: **ESTOPPEL.** Where a party holds title by the descriptions given in a city plat, which does not recognize a highway, dedicated *in pais*, prior to the filing of the plat, he is not thereby estopped from asserting the existence of such highway.

57	121
80	80
57	121
110	484
57	121
111	470
57	121
118	206

Getchell v. Benedict.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 25.

ACTION for the abatement of a nuisance committed in obstructing, by a fence, a public highway and to recover damages resulting therefrom to plaintiffs. There was a verdict and judgment for plaintiffs. Defendant appeals. The facts of the case, so far as they are involved in the questions ruled by the court, appear in the opinion.

Harvey & Lehman, for appellant.

Clark & Connor, for appellees.

BECK, J.—I. The petition alleges that plaintiffs are the owners of lot 11, block 2, of Savery's Park Addition to the city of Des Moines, upon which there are three buildings and other improvements; that north and west of the lots are highways opened and dedicated to the public by Lyon, the grantor of Savery, long before the latter acquired the property and platted it as an addition to the city; that the street west of plaintiffs' property was called Railroad street and the dedication thereof was accepted by the city and work was done and repairs and improvements were made by the city upon that part of the street adjacent to plaintiffs' property; that the public have continuously used the street as a highway for more than twenty years and for more than ten years prior to filing the plat of Savery's Park Addition, and that Savery knew, when he acquired the property, of the dedication of the land as a highway and that it had been used by the public for the time above stated. It is further averred that Savery by his acts and continued recognition of the highway is estopped to deny its existence. It is alleged that defendant has obstructed Railroad street by erecting a fence thereon and by enclosing a portion

Getchell v. Benedict.

thereof adjoining plaintiffs' property, and that defendant still maintains the obstruction to the damage of plaintiffs.

The answer of defendant denies that Lyon ever dedicated or opened the streets in question, and avers that Lyon sold to the M. & M. Railroad Company the land which is described as Savery's Park Addition, of which the realty in controversy is a part, and that he platted the land adjacent thereto, and Railroad street as platted by Lyon is wholly upon the land adjacent to Savery's Park Addition, and is not upon that addition. It is alleged that the land in controversy had been at all times claimed as private property, and that in 1864 Savery purchased from Lyon the tract conveyed and platted it as an addition to the city. The land in controversy upon which plaintiffs claim Railroad street is located is not covered by a street according to Savery's plat, but constitutes a lot. It is shown that this plat was filed in 1870, and it is averred that the city has never claimed that a street exists upon the land which is uninclosed, and has been taxed each year as private property.

II. The evidence tended to show that Lyon in 1853 executed a deed for a tract of land to the M. & M. Railroad Company for depot grounds. The deed is upon condition that if depot buildings should not be erected upon the property within three years the land conveyed should revert to Lyon. The highway in question is upon this land. The railroad company never erected the depot buildings contemplated in the conditions contained in the deed executed by Lyon. It is not denied that the title reverted to Lyon. In 1858 Lyon filed a plat of the land adjacent to this tract as an addition to the city. The land so platted was upon the east, north and south of the depot grounds, but did not cover it. The land in controversy, being a part of the depot ground, is not covered by the plat filed by Lyon. The depot grounds were sold by Lyon to Savery in 1864 or 1865. The evidence tends to establish a dedication of the land in question to the public for the purposes

 Getchell v. Benedict.

of a highway by Lyon before Savery acquired the title, and that the street was improved by the city and was continuously used by the public until it was obstructed by defendant. Other facts need not be stated as they are not essential to an understanding of the questions of law presented by the case.

III. The defendant's counsel do not dispute the correctness of the instructions given to the jury, relating to the proof re-

1. STREET:
dedication in
pais: city
plat.

quired to establish the dedication *in pais* of land for the purposes of a highway, but they insist the instructions were not applicable to the case for this reason: Lyon appropriated the land to the public by the plat which was filed in pursuance of the statute. It is not competent to establish another or different dedication of the same land by parol declaration or acts *in pais*.

The proposition of law announced by counsel may, for the purpose of this case, be admitted. But the record does not disclose the fact to which it is applied in counsel's proposition. The land in question was not covered by the plat filed by Lyon; he made no attempt to dedicate it to the public in that manner. There was not, therefore, a dedication *in pais* of land which had before been dedicated by means of the recorded plat. A further statement of facts as disclosed by the record will make our position plain.

It will be remembered that the land adjacent to the depot tract was platted, while the depot tract itself was not covered by the plat. This plat shows Railroad street adjacent to plaintiffs' lot to be 33 feet wide. This strip, 33 feet in width, was dedicated by the plat. The street is, however, 66 feet in width, the other strip of land covered by the street not dedicated by the plat was dedicated by parol declarations and by acts *in pais*. It will be seen that the street as to half of its width was dedicated by the plat; as to the other half by acts *in pais*. It follows therefore that there is no attempt in this case to show a dedication *in pais* and apply it to the same lands dedicated by the filing of a plat.

If the dedication *in pais* was made before the plat was filed, and there is evidence tending in that direction, and the public acquired a right to the land, that right could not be defeated by a subsequent plat covering one-half of the land. The dedication of the land by acts *in pais* and its acceptance secured rights to the public which were beyond the interference of the dedicator.

IV. Lyon was permitted to testify to declarations he made in 1856, showing dedication at that date. Counsel for defendant insists that this evidence was not competent for the reason that the land at that time had not reverted to Lyon, under the conditions of the deed executed by him to the railroad company. It appears that Lyon was in possession of the land in 1856 and in that year opened the street for public travel. He was not divested wholly of title by his deed to the railroad company; he held an estate upon condition in the land. We need not enquire whether he held such title in the land as would authorize him to make the dedication. Acts of dedications on the part of Lyon in 1858 are shown. The title of the land had then reverted to him. The first declarations made while he was in possession of the land and holding an estate therein upon condition, coupled with his subsequent acts, tend to establish the *animus dedicandi* when the title finally reverted to him. The testimony, we think, was properly admitted.

V. Counsel insists that as the records of the county fail to show the existence of the highway and the strip of land in question has been subjected all the time to the claim of defendant and taxed as her property by the city, it cannot now be regarded as a highway.

Dedication *in pais* is sufficient to establish a highway in the absence of grant or dedication by matter of record. The fact that the county and city records all fail to show the existence of the highway cannot, therefore, defeat the dedication.

The taxation of the land in view of the fact that it was con-

 Getchell v. Benedict.

tinuously used as a highway, will not destroy the easement which the public holds therein. Had defendant been in possession of the land holding it adversely to the public the levy of the taxes thereon would have been inconsistent with the claim that it is a public highway. In this respect the case differs from *Simplot v. The City of Dubuque*, 49 Iowa, 630.

If counsel's position as to the effect of taxation be correct it would be often difficult to maintain highways resting upon dedication *in pais*. Their location is usually indicated by no record and is therefore unknown to the assessors. A land owner, if unfriendly to the existence of a highway, could readily cause it to be assessed. In this manner the public could be deprived of the easement.

VI. It is lastly insisted that plaintiffs are estopped to assert the existence of the highway for the reason that their lot is described in the conveyance to them accordingly to the plat filed by Savery, which does not recognize the highway.

It cannot be claimed that Savery's omission to recognize the highway in the plat defeated the easement held by the public before and at the time he filed the plat. Even if plaintiff had assented to Savery's plat, the public highway would still have had an existence. The question then, is this, are the private and individual rights of plaintiffs to the highway defeated by the fact that they hold under a deed which describes their lot according to the description in Savery's plat? If it be true that plaintiffs have no remedy for the injury they sustained by the obstruction to the highway, it can be so only because they have no rights thereto. We then have the case of the existence of a public highway in which two citizens have no rights—a manifestly absurd result. If plaintiffs have rights in the highway the law gives them a remedy for the deprivation of the rights.

The fact that plaintiffs' lot is described as a part of Savery's Park Addition in no manner affects their title thereto or their

Lewis v. The C., M. & St. P. R. Co.

interest in the property. Matters of description identify the land conveyed; they have no connection with or relation to the estate in the land or the tenure thereof. The highway is appurtenant to the land and the rights thereto pass by a conveyance of the real estate. The street existed by dedication *in pais* before plaintiffs purchased their lot. Of this, Savery, plaintiffs, their grantor, and the whole world, had notice. All are bound to recognize the street as a lawful highway.

Had the highway been originally established by the plat filed by Savery and not by a dedication *in pais* before made, plaintiff could not insist that the street is different from the highway shown by the plat. This we understand to be the effect of *Rowan's Exrs. v. Town of Portland*, 8 B. Mon., 235, cited by defendant's counsel. This case does not touch the question before us.

We have discussed all the questions raised in the argument of defendant's counsel, and have reached the conclusion that the judgment of the Circuit Court ought to be

AFFIRMED.

LEWIS v. THE C., M. & ST. P. R. CO.

1. **Railroads: EVIDENCE: NEGLIGENCE.** A party cannot be chargeable with negligence for not doing that, which, if done, would afford him no protection; and evidence tending to show that plaintiff's failure to plow around his hay-stacks did not contribute to the loss, was properly admitted.
2. —: **INTERROGATORIES TO JURY.** The interrogatories submitted to the jury for special findings, must present specific questions of fact.
3. —: **VERDICT NOT SUSTAINED.** Where the plaintiff did not own, or have any interest, in the land upon which the hay was cut, a verdict allowing damages for the destruction of the hay, is not sustained by the evidence.

57	137
78	304
57	137
125	638
57	127
138	211
138	667

Lewis v. The C., M. & St. P. R. Co.

Appeal from Palo Alto District Court.

TUESDAY, OCTOBER 25.

ACTION to recover the value of certain hay and corn burned by a fire, set out by an engine operated upon defendant's railroad. There was a verdict and judgment for plaintiff. Defendant appeals.

George E. Clark and *M. B. Carey*, for appellant.

No appearance for appellee.

BECK, J.—I. The defendant alleges in its answer that the fire which destroyed the hay and corn, for which the suit is brought, was set out by one of its engines, without any fault or negligence of its own, and that the loss of the property was the result of plaintiff's own negligence.

Evidence was introduced showing that the hay burned was in stacks, and plaintiff had constructed no protection against
1. RAILROADS: fire by plowing around them, or in any other man-
evidence: evidence:
negligence. negligence. ner. The plaintiff was permitted to prove against defendant's objection that there were other stacks of hay on the same tract of land, about forty rods distant, which were protected from fire by plowing around them, the protection thus made being described by the witness, and that these stacks were burned by the same fire that consumed plaintiff's property. The evidence, we think, was correctly admitted. The cause was tried upon the theory that plaintiff, if chargeable with contributory negligence, could not recover. The want of protection to the stacks was alleged to be negligence on plaintiff's part. Of course, under this view, plaintiff was required to do no more for the protection of the hay than would be demanded by reasonable prudence and care. If the stacks, around which furrows had been plowed, were protected

Lewis v. The C., M. & St. P. R. Co.

in such a manner as reasonable care demanded, and were, nevertheless, burned, this would have authorized the jury to find that the loss of plaintiff's hay was not attributable to his own negligence. If ordinary care would not have protected plaintiff from loss, he surely could not be chargeable with negligence for not doing what would have given him no protection. The jury were authorized to determine from the testimony whether the furrows plowed about the stacks were sufficient for the protection demanded by ordinary care. We are not to be understood as holding that the doctrine of contributory negligence is applicable to this case; the point we do not decide.

II. The defendant requested the court to require the jury to answer the following questions: "Was defendant guilty of negligence in permitting the fire to escape from its engine? If so, in what manner? What acts of negligence, if any, do you find on the part of defendant, caused the starting of the fire?"

It was the right of the defendant to have the special findings of the jury upon specific questions of facts to be stated in writing. Code, § 2808. These interrogatories fail to state questions of fact. The first calls for the statement of a conclusion based upon facts, and both require the jury to enter into a statement of the grounds upon which this conclusion is based. The statute contemplates that specific questions of fact shall be submitted to the jury, which would not have been done by the interrogatories propounded by defendant. The court correctly refused to submit the question to the jury.

III. The jury returned a verdict for \$142.50. By a special verdict, it is shown that \$118 of the general verdict was for hay destroyed on section 19. The pleadings put in issue plaintiff's ownership of the hay cut on section 19. The testimony shows, without conflict, that

2. —: in-
terrogatories
to jury.
3. —: ver-
dict not sus-
tained.

 Howe & Company v. Jones.

plaintiff did not own the land in section 19, upon which the hay was cut, that he had no license or permission to cut it, and had no interest in or claim to the land. The testimony of plaintiff himself, is to this effect. Upon these facts, plaintiff is not entitled to recover on account of the destruction of the hay cut upon section 19. This precise point we decided in *Murphy v. S. C. & St. P. R. Co.*, 55 Iowa, 473.

The motion for a new trial should have been sustained, for the reason that the verdict, so far as it includes damages for the destruction of hay upon section 19, has no support from the evidence.

There are other questions in the case which we do not consider, for the reason that some of them will not again arise, should the cause be again tried, and others are quite doubtful. Questions of doubt ought not to be decided, in the absence of discussion on both sides of the case.

For the error above pointed out, the judgment of the District Court is

REVERSED.

 HOWE & CO. v. JONES ET AL.

1. **Garnishment: INTERVENTION.** In this case, *held*, that the plaintiff, by garnishment proceedings, acquired only the title and interest in the property held at the time by the defendant in the action; that a prior lawful assignment would hold the property; and that persons having any interest in the property might intervene.
2. ———: **ASSIGNMENT.** Want of notice of the assignment of a cause of action will not prejudice a garnishee defendant, previously discharged.
3. ———: ———: **POSSESSION.** The provisions of section 1923, Code, do not apply to the assignment of a chose in action, where the owners hold only the possession of a right.
4. ———: **JUDGMENT DEBTOR.** The garnishment of a judgment debtor, under section 2976, Code, does not affect the rights of claimants, but simply the liability of the garnishee.
5. ———: **ASSIGNMENT: VARIANCE: FRAUD.** The variance of evidence as to the consideration for an assignment, and evidence of fraud in the assignment considered: *Held*, not sufficient to defeat the assignment.

57	130
88	438

57	130
109	299

57	130
110	527

57	130
121	393

57	130
136	415

57	130
140	113

Howe & Company v. Jones.

6. ———: ———: STATUTE OF FRAUDS. The parol assignment, clearly and fully established, of a chose in action, as the portion of a judgment, is sufficient. It is not rendered void by section 1923, Code, nor is it, where payment is shown, within the statute of frauds.
7. ———: APPOINTMENT OF RECEIVER: NOTICE. The appointment of a receiver in vacation, and without notice to the adverse party, was erroneous.

Appeal from Marshall District Court.

TUESDAY, OCTOBER 25.

ACTION in chancery. There was a decree granting the relief prayed for in plaintiff's petition. The intervenors, S. Binford & Caswell and Meeker, appeal. The facts of the case appear in the opinion.

Caswell & Meeker, for appellants.

Brown & Binford and *Boardman & Carney*, for appellees.

BECK, J.—I. In an action between Binford and others, plaintiffs, and Boardman and others, defendants, in the Marshall District Court, a decree was rendered requiring defendant Boardman, to deliver certain notes held by him as collaterals, to plaintiffs. Upon appeal to this court, the decree of the District Court was affirmed September 20, 1876. The further facts and proceedings in the action need not be stated, as they cut no figure in this case.

On the 9th day of April, 1877, the plaintiffs, being two mercantile firms, filed their petition in this case, showing the judgment and the proceedings in the action above referred to, and alleging that Boardman had delivered to the clerk of the court the notes involved in the former action, and required to be delivered to plaintiffs therein, and has also paid to the clerk certain moneys and costs provided for by the decree in that case, and that the clerk is about to pay over the notes and money to the plaintiffs in the former action, or to other parties not

Howe & Company v. Jones.

entitled thereto. It is also shown that after the decision of the former action in the Supreme Court, the plaintiffs caused Boardman to be garnished upon certain judgments before recovered by plaintiffs separately in the District Court of Marshall county, who answered, stating that he had in his possession the notes in question, which he was about to deliver to the clerk of the court. It appears that subsequently to this garnishment of Boardman, he delivered the notes to the clerk, as shown by the petition.

The petition further shows that many of the notes are worthless, and those that are good must be collected by proceedings at law. It is alleged that plaintiffs have demanded the notes of the clerk, who refuses to deliver them unless ordered by the court. The petition prays that a receiver be appointed, and that he qualify by giving bond in the sum of \$3,000; that the clerk be required to deliver to him the notes, which the receiver shall proceed to collect, and that upon the final hearing the plaintiffs be adjudged to be the owner thereof.

After the petition was filed, the plaintiffs herein, who are also plaintiffs in the garnishee proceedings against Boardman, under Code, section 2861, agreed to and caused to be entered a judgment in that proceeding, wherein Boardman was ordered to deliver to the clerk of the court the notes and money in his hands; to be held by the clerk or receiver, subject to the further orders of the court, and it was adjudged that upon his compliance with the order, Boardman should be discharged as garnishee. It is shown, that prior to this judgment, the notes and moneys in question were turned over to the clerk, a part thereof upon the day of the filing of the petition in this case, and a part soon after.

On the 10th day of April, the day after the petition was filed, the judge of the District Court at chambers appointed Boardman receiver, pursuant to the prayer of the petition, and it appears that immediately thereafter, the clerk re-delivered

Howe & Company v. Jones.

the notes and moneys to Boardman, as receiver. No notice of the application for the appointment of a receiver was given to the parties adversely interested.

During the first term, after this action was commenced, Samuel Binford filed his petition in intervention, alleging that Binford & Brother, plaintiffs in the original action, assigned to him on the 28th day of April, 1875, the notes and moneys in controversy, and the judgment rendered against Boardman. It is shown that the consideration of this assignment was the reimbursement of the intervenor for whatever amount he had paid or should be required to pay upon a note given by Binford & Bro., upon which he was surety. This assignment, the intervenor alleges in his petition, was to be subject to the claim of the attorneys in the original suit for the services rendered therein. It is alleged that the intervenor had paid \$600 upon the note upon which he was surety as aforesaid. He asks that he may be allowed to intervene in this proceeding, and that his interest in the judgment and notes be declared superior to plaintiffs' claim, and subject only to the claim of the attorneys for services in the original action.

Caswell & Meeker also filed a petition of intervention, showing that they were the attorneys of Binford & Bro. in the original action, and rendered services therein of great value; that they filed liens upon the judgment for their services; and that in June, 1876, by an oral agreement Binford & Bro. transferred and assigned to them \$1,000 of the judgment, or of the collectible notes which Boardman was to turn over under the judgment to secure intervenors for services rendered and to be rendered in the litigation between Binford & Bro. and Boardman. It was agreed that, if the fees of the intervenors should prove to be worth less than \$1,000, they should repay to Binford & Bro. the difference between their value and \$1,000. They ask that their interest in and claim to the notes be enforced by proper judgment.

Binford & Bro. also filed a petition of intervention. It need not be further noticed, as they do not unite in the appeal.

All of these intervenors united in a motion to discharge the receiver, upon the ground that the order appointing him was made upon insufficient showing, and without notice to the parties having adverse interest to the plaintiffs in this action; that the receiver is an improper person to receive the appointment; and for other reasons that need not be here stated.

It will be observed that the intervenors, Samuel Binford, and Caswell & Meeker, between whom there is no conflict, claim an interest in the money and notes involved in this action under certain transfers and assignments set out in the pleadings. The plaintiffs claim the same property under the garnishment process against Boardman, and they further claim that the property is lawfully in the hands of the receiver for their benefit. The notes and money have never reached the hands of plaintiffs, but are now in the hands of Boardman as receiver.

II. We will consider first the claim and interest which plaintiffs have in the property. It will be readily seen that their claim is based wholly upon the garnishee proceedings. Boardman had possession of the property which the court declared in the original proceeding belonged to Binford & Bro., and ordered it to be returned to them. Boardman answered that he had the property in possession. It was by him turned over to the clerk, and by an agreed judgment he was discharged as garnishee. This was all proper enough, for surely the garnishee could be discharged upon surrendering the property to the custody of the law. For this the agreed judgment provides. It also declares that the property shall be subject to the further order of the court. Now the service of the garnishment, the answer of Boardman, and the judgment, did not determine the right of plaintiffs to the property as against the intervenors or others. The pro-

1. GARNISH-
MENT: inter-
vention.

Howe & Company v. Jones.

ceedings, up to and including the judgment, had no other effect than to seize the property in the hands of Boardman and transfer it to the custody of the law. There was no adjudication that plaintiffs should take the avails of the property. On the contrary, the judgment provides that it is to be held subject to further orders of the court, which plainly means that all rights thereto are to be settled by further adjudication in the case.

This certainly was the understanding of plaintiffs, for when they found it in the hands of the clerk, they did not seek to gain possession of it by any process or proceeding, but filed the petition in this case asking for the appointment of a receiver, who shall have power to collect the notes, and praying that upon the final hearing plaintiffs may be adjudged to be the owners of the notes. The notes and money were delivered to the receiver, in whose hands they now are. Now, until the decision of this case in the court below, there was no adjudication that the plaintiffs were entitled under the garnishee proceedings to the property. When the intervenors filed their petition plaintiffs had acquired no right by adjudication to the property. At that time they and plaintiffs stood on equal grounds before the court, pressing their respective interests and claims in and to the property.

If the property at that time had been lawfully assigned and transferred to the intervenors they will hold it, for the plaintiffs can only acquire the title and interest held by the defendants in the action wherein the garnishee process was issued. *Thomas v. Hillhouse*, 17 Iowa, 67; *Manny & Co. v. Adams*, 32 Iowa, 165.

Code, section 3016, provides as follows: "Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in,

or lien on it, under any other attachment, or otherwise, and setting forth the facts upon which such claim is founded, and the petitioner's claim shall be, in a summary manner, investigated. The court may hear the proof, or order a reference or may impanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The cost of such proceedings shall be paid by either party, at the discretion of the court."

This provision clearly contemplates that any claim, lien, interest or title in and to the property attached may be set up at any time before the proceeds are paid to the plaintiff in attachment. The process of attachment or garnishment, and the sale of the property, did not defeat such claim, lien or title. The section quoted provides a remedy by a summary proceeding. The right is not lost if this remedy be not pursued, if the parties seek other proper remedy. Certainly, if, as in the case before us, the plaintiff in attachment seeks by action in chancery, to establish his right to the proceeds of the property attached, persons holding a claim upon the property may interpose. The plaintiff cannot call upon the court in an equitable action to establish his right and deny the right of others to appear and establish claims thereto. Their action was a challenge to the world to contest their right and show a superior claim to the property, for any one having an interest in the property could become a party thereto. Code, § 2683.

We conclude that if the intervenors had a valid interest in the notes and money which had been reached by the process of garnishment, and brought into the custody of the law, they may set it up and recover in this proceeding, if their interest be superior to the claim of plaintiffs.

We are therefore required to determine the conflicting claims of the parties to the notes and money in the custody of the receiver as an officer of the court. We will first consider the interest of Samuel Binford in the property in controversy.

 Howe & Company v. Jones.

III. Binford & Bro. executed an assignment of their judgment against Boardman and the notes in controversy to Samuel Binford of which the following is a copy:

“We hereby sell and assign to Samuel Binford all our right, title, and interest in and to the claim and cause of action and judgment against H. E. J. Boardman and D. P. Carpenter—the same being now pending in the Supreme Court of Iowa, in an action appealed from the Marshall county District Court. Also, all our right and interest in and to all promissory notes now or formerly held by said Boardman as collateral security or otherwise, and now belonging to us, or the proceeds thereof. The consideration of the above assignment is the signing of a note with us by said S. Binford, as surety, for \$1,000, given to Benjamin Williams in November, 1873, and the payment of a portion of said note by said S. Binford.

“BINFORD & BRO., per R. Binford.

“Dated April 28, 1875.”

It will be observed that this instrument was executed after judgment in the original case had been rendered and before the decision in the Supreme Court.

No questions as to notice to Boardman of the assignment arises in the case. As we have seen he has been discharged from liability by delivering the notes and money to the custody of the court. The cases therefore which relate to notice to the garnishee which affect his liability are not applicable to this case. Boardman cannot be prejudiced by want of notice.

IV. Counsel for plaintiffs insist that the assignment in question cannot affect their rights for the reason that they had

3. — : — : no notice thereof, and the instrument was not acknowledged and recorded. This position is based upon Code, section 1923, which is in the following language:

“No sale or mortgage of personal property where the vendor

or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides."

This provision applies to the case wherein the vendor or mortgagor retains actual possession of the property. Upon reflection it will appear that the subject transferred in the assignment was not in the possession of the assignors. This cannot be questioned so far as the instrument may be regarded as transferring an interest in the notes, for they were not in the possession of the assignors, but at the time, and have since been in the hands of Boardman. Let us consider the instrument as an assignment of the judgment against Boardman. The thing, the property transferred, is the chose in action, evidenced by the judgment. It cannot be said that the assignors in the instrument were in possession of the chose in action. They had a right to the money or notes which were in the possession of Boardman. This property was in action and is called a chose in action because the holder has not its present possession.

The section of the Code contemplates the property itself, not the right to it; therefore it cannot be said that the assignors retained the possession of the right. By the transfer they, in fact, parted with the possession of the right.

The judgment, as it appears upon the record of the court, is not the chose in action, but the evidence thereof. But should it be thought that it is the chose in action, and the property which was transferred by the assignment, it must be admitted that its actual possession was not retained by the assignors, for they neither before or after the transfer had possession of the judgment. We conclude that the transfer under consideration is not within the section of the Code above quoted.

Howe & Company v. Jones.

V. Code, section 2976, provides that a judgment debtor may be garnished "when the judgment has not been previously assigned on the record or by writing filed in the office of the clerk, and by him minuted as an assignment upon the margin of the judgment docket." This provision does not affect the rights of the claimants of property or money in the hands of the garnishee. It simply relates to his liability. As we have seen, after the garnishee answers and delivers the money and property into the custody of the court, the right to the property may be contested by claimants thereto. Intervenors in this case are not defeated of their claims to the property by this section.

VI. Counsel for plaintiff insist that Samuel Binford cannot recover in this action for the reason that the proofs fail to show the payment referred to in the assignment as the consideration thereof. The ground of this objection is that the evidence shows payment upon a note dated in 1872, while the assignment designates a note dated in 1873.

The instrument shows that payment was made by S. Binford as the surety of the assignors, which was the consideration of the assignment. The proof shows the payment to have been made by S. Binford as surety on a note of a different date from the one described in the assignment. Surely it cannot be expected that a court of equity will defeat the assignment on this ground. The intervenor has, in fact, paid the money which is the consideration of the assignment. He cannot be defeated because either in the assignment or proof there is a mistake as to the date of the note or for the reason that the payment was upon a note other than the one referred to in the assignment, the intervenors being surety on both.

VII. Plaintiffs insist that the assignment to Samuel Binford was collusive and fraudulent, and therefore void. To support this position counsel insist: 1st. That the transaction was secret. The secrecy complained of consists in a failure of

Samuel Binford to make it known to Boardman. One of the notes in controversy held by Boardman is against Samuel Binford. This circumstance is urged as a reason why the assignment should have been made known to Boardman. If the assignment was relied on as a defense to this note, it may be true that Boardman should have had notice thereof. But nothing of the kind is shown by the evidence. We are unable to reach the conclusion that failure to notify Boardman authorizes the conclusion that the transaction was fraudulent.

2. It is next insisted that Samuel Binford was not present when the assignment was executed. But the testimony shows the fact to be that it was made pursuant to agreement before entered into between the parties.

3. Binford & Bro. afterwards assigned the judgment upon the court docket to one who had no knowledge of the transaction, and afterwards repudiated it. It is not shown that S. Binford had any knowledge of this transaction, or in any way participated therein. If it was fraudulent on the part of Binford & Bro., it is not shown that S. Binford shared their intentions and purposes.

4. It is urged that Samuel Binford made no payment as surety after the assignment was made; the payments were made before. The assignment itself and the intervening petition show this to be the fact. We fail to see that it establishes fraud.

VIII. We will now proceed to consider the assignment to Caswell & Meeker. It is shown that these intervenors were
 6. —: —: the attorneys of Binford & Bro. in prosecuting the
 statute of
 frauds. litigation with Boardman; that Binford & Bro. agreed "to turn over" the judgment to secure the attorneys' fees, and in pursuance of this understanding soon after the decision of the case in the Supreme Court they did by an oral agreement assign and transfer \$1,000 of the judgment to the intervenor.

A parol assignment of a chose in action is sufficient. *Moore*

Howe & Company v. Jones.

v. *Lowrey*, 25 Iowa, 335; *Bartrol v. Blakin et al.*, 34 Iowa, 452; *Switzer v. Smith et al.*, 35 Iowa, 269.

IX. The plaintiffs insist that the evidence fails to show that this assignment relied upon by the intervenor was ever, in fact, made. They base their position upon various grounds which we need not state. It is sufficient for us to say that the oral agreement is clearly and fully established by the positive testimony of all the parties thereto, four witnesses. The inferences from circumstances relied upon by plaintiffs cannot overcome the evidence of these witnesses.

X. It is urged that the assignment is void under Code, section 1923, for the reason that the assignors retained actual possession of the property assigned. The same objection is considered in the foregoing discussion of the claim of Samuel Binford, and held not to be well taken. What we have said upon the point need not be repeated; it is applicable to this branch of the case.

XI. It is argued by counsel that the assignment being in parol, is within the statute of frauds. Code, § 3664, paragraph 4. It is insisted that the intervenors made no payment upon the assignment. The testimony is to the effect that the assignment was taken in payment of services rendered and to be rendered by the assignees. But plaintiffs say the books of the assignees do not show credits for the payment and the charges stand without a credit. Surely, the failure to credit the assignors upon the books of the assignees would not defeat their positive agreement to accept the assignment in payment for services already rendered.

XII. By agreement between Samuel Binford and Caswell & Meeker, the interest which the party last named acquired under the assignment to them was to be prior to the interest acquired by Samuel Binford. This arrangement was concurred in by Binford & Bro., and as plaintiffs are not prejudiced thereby, it must be enforced.

XIII. The evidence as to the amount due to Caswell &

 Howe & Company v. Jones.

Meeker for services, for the payment of which the assignment was made, is conflicting, and it is not as clearly presented as it ought to be, either in the abstract or amended abstract. We think the preponderance of the testimony supports the claim for \$810, and accordingly adopt that as the sum to which they are entitled.

XIV. The receiver was appointed in vacation, without notice to the adverse parties. This was erroneous, and the action <sup>7. ———: ap-
pointment of
receiver: no-
tice.</sup> of the court, because of want of notice, required by law, cannot be sustained. Code, § 2903. *French v. Gifford*, 30 Iowa, 148; *Bisson v. Curry*, 35 Id., 72. Other questions discussed by counsel need not be considered.

XV. The decree of the District Court must be reversed, and the cause must be remanded to the court below for a decree in harmony with this opinion. Such a decree will provide that the order of the court, appointing the receiver, be set aside, and that the receiver deliver to the clerk of the District Court all moneys, notes, or other property received or held by him under the receivership. It will further provide that the intervenors, Caswell & Meeker, receive therefrom \$810, with interest from April 21, 1879, at six per centum per annum, and that the intervenor, S. Binford, after the payment to the other intervenors, shall receive the balance of the money or whatever may remain of the notes and assets in controversy in this action, or their proceeds.

REVERSED.

SUPPLEMENTAL OPINION.

BECK, J.—I. A petition for a rehearing was filed by plaintiffs, which directs our attention to some points of the opinion that may be made plainer by a brief additional consideration. Counsel object to the conclusion of the 11th point of the opinion, and insist that there was no payment for the judgment by the intervenors, which takes the transaction out of the operation of the statute of frauds. Facts upon which our conclusion

announced in this point is based, are stated in the 8th point, and in other parts of the opinion, as well as in the 11th point itself. The record warrants the statement of another fact which does not clearly appear in the opinion, namely: services of the intervenors, Caswell & Meeker, were rendered under an agreement that they should be paid for by the assignment of the judgment. This agreement was first made during the progress of the litigation, and before all the services were rendered. Upon this agreement the intervenors relied for compensation of their services, before and afterward rendered. If "A," who is in the employment of "B," agrees to accept as compensation for past and future services, specified personal property, and if, in fulfillment of this agreement, "A" completes the services, and "B" thereupon orally transfers the property without delivery, the transaction will not be within the statute of frauds. There is a contract for services, to be paid for by the transfer of personal property. When the transfer is made, the law will regard that payment has been made for the property. This is the precise case before us. Our conclusion does not require the citation of authorities in its support.

II. Counsel for plaintiffs, in their original argument, insisted that the evidence failed to show "a setting apart, as required by law, of such part as they bought of a judgment, which called for notes, face, say \$1,500—a part of which were worthless—and cost \$180.87; and costs, say \$300, not then taxed, a part of which were ordered taxed to the Binfords." We have stated counsel's position in their own language. They complain that it is not noticed in our opinion. It will be observed that intervenors claim under an assignment of the judgment to the extent of \$1,000. There was no assignment of notes, costs, etc. The assignment sufficiently sets apart the portion of the judgment, \$1,000, transferred.

III. It is urged, in the petition for a rehearing, that the intervenors, who alone appeal, cannot complain of the erro-

Grimmell v. The City of Des Moines.

neous appointment of the receiver. It is very plain that the rights and interests of the intervenors were affected by the appointment of the receiver. They intervene in this action to enforce their rights, and become parties thereto. Code, § 2683. As parties to the action, they may object to the appointment of the receiver, as being prejudicial to their interest and rights.

We need not consider other matters discussed in the petition for a rehearing; it is overruled.

GRIMMELL V. THE CITY OF DES MOINES.

1. **Municipal Corporations: SEWERAGE DISTRICTS.** Cities of the first class, under chapter 162, Acts of Seventeenth General Assembly, have authority to constitute but one sewerage district for the entire city.
2. ———: **ORDINANCE: RESOLUTION.** Where the ordinance of a city providing for the construction of sewers also provides that the council may order the construction of a sewer by resolution, and the resolution is passed, it is sufficient; and when such resolution does not provide for contracting the work, its passage need not be upon the call of yeas and nays.
3. ———: **ASSESSMENT: CHANCERY.** The assessment of property for the construction of a sewer in this case was not inequitable, and if there was inequality in the assessment, chancery will not hear the complaint, unless the party pay, or offer to pay, the portion of the tax justly due.
4. ———: ———: **SEWER.** Where the sewer is a unit, though constructed along more than one street, a single assessment therefor is valid.
5. ———: ———. An assessment for a sewer is not rendered invalid because the resolution ordering the same did not direct the manner of payment.
6. ———: ———: **EXCESSIVE.** Under chapter 162, Acts of Seventeenth General Assembly, the city did not exceed its authority in making the assessment for sewerage purposes.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 25.

ACTION in chancery to cancel and set aside an assessment made upon plaintiff's property for a sewer constructed in a

57	144
107	101

57	144
118	225

57	144
1144	194

Grimmell v. The City of Des Moines.

street adjacent thereto. Upon a trial on the merits plaintiff's petition was dismissed. She now appeals to this court.

Barcroft, Gatch & McCaughn, for appellant.

Miller & Godfrey, for appellee.

BECK, J.—I. The City of Des Moines caused a sewer to be constructed, beginning at Water street, and running thence along Locust and Sixth streets to the intersection of Chestnut street. The cost of its construction was assessed upon the lots adjacent to the streets along which it was built. Plaintiff owns a block of lots abutting upon the part of Sixth street where the sewer is constructed. An assessment was made upon this block to pay for the construction of the sewer. Plaintiff claims that for various reasons the assessment is irregular and void, and brings this action, praying that it may be canceled and set aside.

The case may be more briefly and satisfactorily disposed of by considering the objections made by plaintiff to the tax in the order we find them discussed in the argument of her counsel. The facts involved will be stated in connection with our discussion of the several points.

II. It is first insisted that the defendant by failing to comply with the statute of the State did not acquire authority to assess the cost of constructing the sewer upon adjacent lots. The statute conferring such authority upon cities of the first class is chapter 162, Acts Seventeenth General Assembly, the first section of which is in the following language:

1. MUNICIPAL
corporations:
sewerage dis-
tricts.

“All cities of the first class in the State which have not commenced a general system of sewerage by the levy and expenditure of any tax therefor under the provisions of chapter 107, Acts of the Sixteenth General Assembly, may provide by ordinance for the construction of sewers, or may divide the city into sewerage districts, in such manner as the council may

Grimmell v. The City of Des Moines.

determine, and pay the cost of constructing same out of the general revenue of the city, or assess the cost upon the adjacent property, or may levy a certain sewerage tax within the sewerage district, out of which to pay for the construction of the same, which sewerage tax shall not exceed, in any one year, two mills on the dollar of the assessed value of the property within such district; or, may pay a part of the cost of such construction out of the general revenue, a part by the assessment of adjacent property, and a part by levying a tax upon all the property within the sewerage district, or may pay for the same by pursuing any two of the methods herein named "

The ordinance of the city passed pursuant to the statute provided that the city shall constitute but one sewerage district.

Counsel for plaintiff insist that, as the city has not been divided into two or more sewerage divisions, it cannot provide for the payment of the cost of constructing sewers under the provisions of the statutes above quoted, but must do so under the statutes by appropriations out of the general revenue of the city or out of a special two per cent sewer tax. See Code § 465; section 1, chapter 107, Acts Sixteenth General Assembly.

We will first inquire whether under the act just quoted the city has authority to create one sewerage district comprising all of its territory.

The statute provides that by ordinance the municipal government "may divide the city into sewerage districts in such manner as the council may determine." This language authorizes the creation of more than one district, but if it be consistent with other words of the statute and in accord with its reason and spirit it may be so construed as to authorize the creation of one district, for "words importing the plural number may be applied to one person or thing." Code, § 45, ¶ 3. The intention of the statute is to authorize the cities to create taxing districts for the purpose of a just distribution of the

Grimmell v. The City of Des Moines.

burdens imposed in the construction of sewers. Their number, size, boundaries, etc., are left to the discretion of the legislative department of the municipal government. This discretion is to be exercised to attain the objects of the provision, namely, the equal distribution of the burdens of taxation among the tax payers in view of the benefits of the improvement to be constructed and the true interests of the city. The right attainment of this end, resting, as we have said, in the discretion of the city council, is not a matter of inquiry by the courts, unless, of course, the rights of citizens are encroached upon.

Now if the city determines that only one taxing district is demanded by the circumstances of the case, it has exercised the power imposed upon it; it has done what the statute authorizes, namely, has provided for taxation by the plan contemplated through the taxing district. We conclude that the city is authorized to constitute but one sewerage district for the whole city.

III. The ordinance of the city provides for the manner of constructing sewers, for letting the work, for the levy of ² ———: ordi- assessments to pay therefor, etc., and that the city nance : res- council may by resolution order the construction olution. of a sewer upon any street by a majority vote when such improvement is asked for in a petition by a majority of the resident property holders or by a two-thirds vote of the council if there be no such petition. The resolution contemplated by this ordinance was passed. But counsel for plaintiff insist that the work could be ordered only by ordinance. But the statute above cited expressly declares that the city "may provide by ordinance" for the construction of sewers. This defendant has done in compliance with this provision of the statute. The authority conferred by the statute and assumed by the ordinance was brought into exercise and applied to the sewer in question by the resolution. This is in harmony with the provisions of the statute.

IV. It is insisted that the resolution ordering the work was

Grimmell v. The City of Des Moines.

not passed by a vote of two-thirds of the member of the city council. Without considering the effect of the record of the proceedings of the council we are of the opinion that the preponderance of the testimony clearly shows that the resolution was passed by a two-thirds vote of the council. It would not prove to be profitable to enter upon the discussion of the evidence upon this point of the case.

V. It is made the ground of an objection that the vote upon the passage of the resolution was not upon the call of the yeas and nays. The resolution does not provide for contracting the work; it is not an ordinance, and is not therefore, within the operation of Code, Sec. 493, requiring such action to be had upon a vote by yeas and nays. We know of no provision of the law sustaining counsel's position.

VI. Counsel for plaintiff insist that the ordinance of the city providing for the assessment "is so grossely and manifestly inequitable and unreasonable as to be void for that reason alone." This charge is based upon the provision of the ordinance declaring that the assessments shall be made according to the superficial area of each lot and not according to frontage. It is provided that all property within the distance of one hundred and fifty feet shall be deemed adjacent to the sewer except where property is bisected by an ally, when that part between the ally and sewer alone shall be regarded as adjacent. It is pointed out by counsel that property of greater depth is subject to greater assessment. We see nothing in this that is inequitable. The depth of the lots adds to their value and should require the payment of larger assessments than is required of shorter lots. In the case of alleys dividing the property of an owner, it appears proper that the assessment should not extend across the ally as it separates the different lots and those beyond cannot be called adjacent. There may arise cases of apparent hardship and injustice under the ordinance. There would surely arise like cases under any other plan of assessment. Perfect equal-

Grimmell v. The City of Des Moines.

ity of taxation under any system has never been attained. The law requires no more than proximate equality. We think it is attained under the ordinance in this case.

But if plaintiff has just ground of complaint because of the inequality of the assessment she has not put herself in position to claim relief in equity. She does not deny that she is justly liable under the ordinance, if it be valid, for a portion, at least, of the assessment. She cannot defeat the whole assessment, and chancery will not hear her complaint unless she pay or offer to pay the part of the tax justly due. *Morrison et al. v. Hershire*, 32 Iowa, 271.

VII. The cost of the sewer at the crossing of the streets is assessed to the adjacent property. This constitutes another ground of complaint of plaintiff. It is only necessary to say that we cannot determine from the abstract before us that plaintiff's property was especially assessed for the costs of constructing the sewer at any street crossing. It is probable that the cost of the sewer at the crossings of the streets was distributed among all the lot owners assessed. We will not inquire into the justice of the provision or determine whether it can be made the ground of relief. As plaintiff has not paid or offered to pay any portion of the tax she cannot, as we have just pointed out, maintain this action by which she seeks to defeat the whole assessment.

VIII. It is next insisted that the assessment is invalid for the reason that the sewer is constructed along more than one street and the assessment is made for the whole work. Cases involving the improvement of more than one street upon one assessment are cited to support this objection. They throw no light upon the case. There may be just ground of objection to the improvement of two streets under one proceeding, and the payment therefor by one assessment; but the sewer involved in this case is a unity; it is one sewer along more than one street; it does not branch or separate; it is but one

sewer from the beginning to the end. Not so with streets which run parallel or at right angles with each other. There may be reasons why they cannot be improved under one proceeding. No such reason exists in the case of the construction of one sewer.

IX. In the proceedings of the city council the sewer is designated "the Locust Street Sewer." Counsel insist that there was no action authorizing the construction of the sewer on Sixth Street. The name designated the sewer and the survey indicated the streets along which it was to be constructed. It is shown that the sewer was authorized upon both Locust and Sixth streets by the action of the council.

X. The plaintiff insists that the assessment is invalid for the reason that the resolution ordering the work does not direct a. —: —. the manner of payment therefor. But this was done by the ordinance which we have seen provides for the manner of constructing the sewer and the assessments for payment thereof. The resolution of the council simply called into exercise the powers assumed by the ordinance and directed their application to the sewer in question.

XI. It is lastly insisted that the assessment is in excess of the amount authorized by law to be levied for sewerage purposes. —: —: poses. This may be true as to the statutes existing excessive. before the law under which the city acted in the case. The city, however, did not attempt the exercise of power under the statutes. It cannot be claimed that the assessments authorized by Chap. 162, Acts 17th General Assembly, are restricted and controlled by the prior laws. The very purpose of the last statute was to increase the power of the city to levy taxes and assessments for the building of sewers. It authorizes the levy of the cost of their construction upon adjacent property without limit as to the amount of the assessment. The city has not exceeded the extent of its authority in making the assessment in question in this case.

Aldrich v. Price & Company.

We have considered all the questions discussed by plaintiff's counsel and reach the conclusion that the decree of the Circuit Court ought to be

AFFIRMED.

ALDRICH V. PRICE & CO.

1. **Contract: CHANGE OF: SPECIAL FINDINGS.** In this case it was held, that the special findings of the jury showed that the written contract was substantially abandoned; that a new oral contract was entered into by the parties; and that the general verdict must have been based on such oral contract.
2. **Practice.** The special findings being inconsistent with the general verdict, no judgment should have been rendered on the verdict.
3. ———: **EXCEPTION: TRANSCRIPT.** On rehearing; *held*, that the overruling of defendant's motion, having been excepted to, it was not necessary to except to the judgment on the verdict; and that appellee having failed to ask for a transcript or object to the submission on the abstract filed, the case would be determined on its merits.

Appeal from the Superior Court of Cedar Rapids.

TUESDAY, OCTOBER 25.

THE original petition states that the plaintiff and defendants entered into a written contract whereby the plaintiff was to furnish the required timber and cut and hew ties and deliver the same to the defendants at any point on the grade of the Iowa Southwestern Railroad Company for which the defendants were to pay him forty cents for each tie. By the terms of this contract the plaintiff also agreed to deliver certain timber cut into suitable length for ties at the saw-mill of defendants and after the ties were sawed plaintiff was to deliver the same on said grade, for which defendants agreed to pay him thirty cents for each tie. Performance on his part was alleged and that defendants had failed to pay as required by said contract.

57	151
90	374
57	151
137	506

Aldrich v. Price & Company.

In an amended petition it is stated the defendants "waived the delivery of the ties mentioned in the contract sued on at the points designated in said contract, and the same were afterward delivered to and accepted by defendants under said contract during the spring, and summer and fall of 1872. That the defendants by their own acts prevented a delivery of and refused to accept said ties except in the manner and at the places and terms above specified, and caused a delivery as above indicated. Whereby and because thereof defendants are now estopped from urging as a defense that the plaintiff has in any manner failed to make a delivery of said ties in accordance with the terms and places fixed in said contract. That the waiver referred to was by parol."

The defendant pleaded a general denial, the statute of limitations, and that before the delivery of any of the ties the firm of John R. Price & Co. was dissolved, and that W. Phinney, one of the members thereof and a defendant in this action, entered into a verbal arrangement whereby it was mutually agreed plaintiff should not deliver such ties to defendant at the place mentioned in the written contract, and the same was rescinded and abandoned by the plaintiff and the said Phinney, and the plaintiff agreed to deliver the said ties to said Phinney on the line of the Tipton branch of the North Western Railroad about five miles distant from the point of delivery mentioned in the written contract, and the said Phinney agreed to pay plaintiff the amount provided in said written contract, and an additional compensation for hauling of five cents per tie. There was a trial by jury and a general verdict for the plaintiff for \$541.53. Interrogatories were propounded to and answered by the jury. The defendants moved the court to arrest the judgment and for judgment on the special findings. Both of which were overruled, and judgment rendered on the general verdict for the plaintiff. The defendants appeal.

H. W. Gleason and Williams & McMillan, for appellants.

Rickle, West & Eastman, for appellee.

SEEVERS, J.—Counsel have discussed the question whether the firm of John R. Price & Co. was dissolved, and if so, its effect on the rights of the plaintiff. In the view we take of the case this is immaterial. It will, therefore, be conceded no such dissolution took place.

It is conceded, as we understand, by counsel, if the action was brought and the recovery had on the written contract it is not barred. Counsel for the appellants insist the recovery was obtained on and because of the parol contract pleaded, and therefore, the bar of the statute is complete. Counsel for appellee do not deny the legal proposition claimed by the appellants, but the fact. They insist the action was brought and recovery had upon the written contract, and what appellees designate an oral contract was nothing more or less than a waiver of a strict performance of the written contract, and an acceptance by the appellees of another or different performance.

The interrogatories propounded to and special findings of the jury are as follows.

1. Where were the ties in issue in this action actually delivered by the plaintiff?

Ans. On the Tipton Branch of the Chicago and North Western Railroad.

2. Was there a contract between the plaintiff and Wm. Phinney, that the said ties were to be delivered on the Tipton Branch of the Chicago and Northwestern Railroad, instead of the point designated in the written contract?

Ans. There was.

3. Was said contract by parol or in writing?

Ans. By parol.

1. CONTRACT:
charge of:
special ver-
dict.

Aldrich v. Price & Company.

4. What was said contract and what were its terms?

Ans. Contract was that the ties were to be delivered on the Tipton Branch of the C. & N. W. Railroad Co., and that the defendant should haul enough to make up extra distance.

12. Was it agreed by parol between the plaintiff and said Phinney, that the said ties should not be delivered at the point designated in the original contract, but that instead they should be delivered on the Tipton Branch of the Chicago & Northwestern Railroad?

Ans. Yes.

It seems to us the special findings quite satisfactorily show there was a parol contract entered into between Phinney and the plaintiff whereby the written contract was materially changed, substantially abandoned, and a new oral contract entered into with the terms and conditions of which the plaintiff complied. There is no pretence the written contract was performed by either party. The special findings do not support the claim of the plaintiff that there was a waiver of performance of written contract. Clearly the special findings do not so state in terms. Besides they negative such thought. Waiver of performance is quite different from a new contract containing other and different stipulations of an affirmative character. Now the jury have without doubt found there was a parol contract entered into by the parties. They have not found there was a waiver of the written contract, unless such inference is to be drawn because the former took the place of the latter. If this be conceded then as the written contract was not in force, the recovery, if had at all, must be based on the oral contract.

The written contract bound the plaintiff to deliver the ties by the first day of March, 1872. The amended petition states they were not delivered until the summer and fall of 1872. The special findings taken in connection with what has been just stated, show that by the terms of the oral contract the time and place of delivery were changed, and also as we think the com-

Aldrich v. Price & Company.

pensation or price to be paid the plaintiff. For while the price stipulated in the written contract was not expressly changed, yet because of the increased distance of delivery agreed upon, the plaintiff was required to deliver at such place only a portion instead of all the ties. This necessarily increased or diminished what the plaintiff had bound himself to do and in like manner affected the compensation provided in the written contract.

Under the special findings of the jury we are of the opinion the recovery was had on the oral contract, and thereunder the
2. PRACTICE. jury must have found the general verdict. This being so no judgment should have been rendered on the latter, but the motion of defendants for judgment in their favor on the special findings should have been sustained. *McGregor and Sioux City R. R. v. Foley*, 38 Iowa, 588.

REVERSED.

ON REHEARING.

SEEVERS, J.—A rehearing is asked by counsel for the appellee upon the following grounds:

1. No motion, it is said, was filed for judgment on the special verdict, and no exception was taken to the judgment.

2. ———: ex- The abstract shows what is called a motion in ar-
ception;
transcript rest of judgment was filed upon the ground "that the pleadings and facts found by the jury in the special verdict show that the verdict is excessive, and that there should be a judgment for defendant for costs, and plaintiff is entitled to judgment for no amount whatever." This motion was overruled, and defendant excepted. We think the motion clearly asked for judgment for the defendant for costs on the pleadings and special verdict. As the overruling of the motion was duly excepted to, it was unnecessary to except to the judgment afterward rendered.

II. It is said, the judgment should have been affirmed on motion, because the abstract had not been agreed to, and no

Aldrich v. Price & Company.

transcript was filed. Nothing was said in the opinion in relation to the motion, because at the time it was filed we supposed the bar understood the practice to be that we would not affirm a judgment for the reasons above stated, but would order a transcript filed when one was desired. We have again looked into the record, and fail to find the appellee asked for a transcript or objected to the submission upon the ground the abstract was not full and perfect. It is true, it is said at the close of appellee's argument, the abstract was not full and complete, and that the record was in the hands of counsel for appellants, and therefore, counsel for the appellees were unable to file a full and complete abstract, but no relief was asked in this respect. Under such circumstances, we were bound, we think, to determine the case on the merits (as presented by the abstract).

III. We have again examined the record, in view of what is said in the petition for a rehearing, as to the correctness of the opinion, and feel constrained to say our convictions are unchanged. Counsel are mistaken in supposing we overlooked evidence to which our attention is called. Under it there might be doubts whether a new contract was entered into. A finding by the jury either way would probably not be disturbed. But as will be seen from the foregoing opinion, we construed the special verdict as finding there was such new contract, and counsel have not, in the petition for a rehearing, controverted the correctness of such construction. It therefore must necessarily follow, we think, the conclusion reached is correct. The former opinion is adhered to. •

 Hadley v. Gregory.

HADLEY V. GREGORY ET AL.

1. **Administration: PETITION TO SELL LANDS: BARRED.** Where the administration in this State is but ancillary to the original administration in a foreign State, and the law applicable to the case in that State is not shown, it will be presumed to be the same as our own; and where an application for the sale of real estate for the payment of the debts of the intestate is made long after the original administration, and after the time allowed by our statutes for establishing claims has expired, the proceedings will be barred.

Appeal from Adair Circuit Court.

TUESDAY, OCTOBER 25.

THE plaintiff filed his petition in the Circuit Court, asking for an order authorizing the sale of the lands belonging to the estate of which he is administrator, for the payment of the debts of the intestate. The order was made, and defendants appeal. The facts of the case appear in the opinion.

H. E. Long, for appellant.

Gow & Hager, for appellee.

BECK J.—I. Plaintiff's intestate died in the State of Indiana, where he was a resident. Administration was there had upon his estate, and the personal assets were used in the payment of debts and costs of the probate proceedings. All debts against the estate were proved before the Probate Court of Indiana, and proper orders were made for their payment. Ancillary administration was had in Adair county, and exemplifications of the record of the Indiana Probate Court were filed in the Circuit Court. The administrator filed his petition therein, showing the proceedings in Indiana, and alleging that intestate died seized of certain lands in Adair county, which he prayed the court would order to be sold for the payment of the debts allowed against the estate. The petition properly shows the condition of the estate, the amount of debts

57	157
83	746
57	157
94	572
94	644

57	157
106	457

57	157
119	132

57	157
138	204

57	157
144	77

 Hadley v. Gregory.

allowed, etc., etc. No question is raised as to the regularity of the proceedings, either in Indiana or Iowa.

The record shows that the intestate died October 13, 1874. November 16, 1874, administration was granted in Indiana, and prior to the 22d day of November, 1876, all claims against the estate were presented and allowed, and a final report of the administrator was filed and approved, showing full administration upon the personal assets of the estate. May 13, 1879, the petition in this case for the sale of the lands of the estate was filed. The indebtedness, for the payment of which the administrator asks that the lands be sold, consists of the claims allowed in Indiana; no claims were originally presented in the court below. Other facts of the case need not be presented here, in view of the disposition we make of the case.

II. The decisive question in the case is this: Is the application for the sale of the lands barred by the lapse of time since the allowance of the claims in the Indiana court? We have held that applications for the sale of real estate, for the payment of the debts of the intestate cannot be made after the expiration of the time allowed for establishing claims has expired, unless peculiar circumstances exist, which authorize a court of equity to depart from the rule. *McCrary v. Tasker et al.*, 41 Iowa, 255; *Conger v. Cook et al.*, 56 Iowa, 117.

We may concede, for the purpose of this case, that the law prevailing in Indiana, which operates to limit the time for filing claims against the estate, must be applied to this case. The fact that the administration in this State is but ancillary to the original administration had in Indiana would seem to support this conclusion.

But the law prevailing in Indiana applicable to this branch of the case is not shown by the record. We will presume it to be the same as the law of this State. *Neese v. Farmer's Insurance Co.*, 55 Iowa, 604; *Stephens v. Williams*, 46 Iowa, 540.

Hadley v. Gregory.

We will presume that the statute requiring the administrator to give notice of his appointment was complied with. *McCrary v. Tasker*, 41 Iowa, 255 (260).

More than four years and a half expired from the time we will presume the notice was given, before the petition in this case was filed. Claims against an estate, not filed and allowed within twelve months, are barred, "unless peculiar circumstances entitle the claimant to equitable relief." Code, § 2421.

The record fails to show any circumstances entitling the plaintiff to equitable relief. It is urged that the promise of the widow of the intestate to pay the claims, and the execution by her of promissory notes for some of them, and the further fact that indulgence was extended to the estate for the benefit of the widow and heirs, constitute circumstances of the character contemplated by the statute. But the claimants in these transactions did not deal with the estate, and the widow, not being the administrator, could not bind the estate by her promises. Nor would the indulgence extended by the creditors for the benefit of the widow and heirs in any way affect their right to resist the enforcement of the claims against the lands of the estate. The case is not like *Burroughs v. McLain*, Adm'r., 37 Iowa, 189, or *Baldwin v. Dougherty*, 39 Iowa, 50, in which indulgence was extended to the estate upon faith in the promises and representations of the administrators that the claims would be paid. The promises in this case were made by the widow, and not the administrator.

We reach the conclusion that the petition for the sale of the lands was not filed in time, and that the proceedings are barred. The judgment of the Circuit Court is

REVERSED.

County of Floyd v. Cheney.

COUNTY OF FLOYD V. CHENEY.

1. **Decree: TRIAL UPON ISSUES OF FACT.** Where the decree recites that "the issues are found for the plaintiff, and that the allegations of the petition are true," it will be construed to imply there was a trial upon the issues of fact.
2. —: **NOT VOID.** A decree entered by default, by a judge who had been attorney for one of the parties in the transaction, is not for that reason, void.
3. —: **SENIOR AND JUNIOR MORTGAGEES: STATUTE OF LIMITATION.** The foreclosure by a senior mortgagee will not affect the rights of a junior mortgagee not made a party. In such case, however, the junior mortgagee can only acquire possession by redemption, and all right to redeem or to obtain possession, will be barred by limitation in ten years.

Appeal from Floyd Circuit Court.

TUESDAY, OCTOBER 25.

ACTION in equity to quiet plaintiff's title to certain real estate. The defendant filed an answer and also a cross-petition in which he claimed to be the owner of the land. There was a demurrer to the answer and cross-petition which was sustained, and a decree was entered for the plaintiff. Defendant appeals.

Hand & Spriggs, for appellant.

Ellis & Ellis, for appellee.

ROTHROCK, J.—The demurrer was sustained, as we understand it, upon the ground that the defendant was precluded by the statute of limitations from making the defense set up in the answer, and from asserting the claim made in the cross-petition.

The facts as averred in the petition are as follows: The plaintiff held a school fund mortgage upon the land, executed by one Collins, and at some time, the date of which does not appear, the same was foreclosed. This mortgage was the first

lien upon the land. The plaintiff was the purchaser at the foreclosure sale and received a sheriff's deed on December 19th, 1865. On the 28th day of March, 1868, the plaintiff executed and delivered to one Thompson a contract, agreeing upon the payment of certain sums of money, to convey to him a good title to said land, which sums of money have not all been paid. Thompson took actual possession of the land and was in the actual, continued, open and peaceable possession thereof for more than ten years before the commencement of this suit.

The answer in addition to certain general denials avers as a defense that plaintiff's decree of foreclosure, is, and was void, because the attorney who procured the same was at the time judge of the District Court in which said decree was entered, and that said attorney and judge heard, tried, and determined the said suit without the consent of any of the defendants therein.

As a further defense it is averred that said Collins who was owner of the land in question on the 12th day of November, 1858, executed a trust deed thereon to one Chapman, to secure the payment of certain moneys to this defendant. That said trust deed was duly foreclosed and the defendant became the purchaser at sheriff's sale under said foreclosure, and received a sheriff's deed therefor on the 31st day of December, 1863. That said conveyance was made to defendant long before the commencement of the foreclosure proceedings under which plaintiff claims. That this defendant was thereby invested with the legal title to the land, and she was not made a party to plaintiff's foreclosure.

There is an admission in the answer that said Thompson took possession of the land, but there is a distinct and unequivocal denial that such possession has been open, peaceable and uninterrupted, with the knowledge of the defendant for ten years last past. The cross-petition sets out the same facts as to the foreclosure of plaintiff's mortgage and defendant's

County of Floyd v. Cheney.

trust deed, which are averred in the answer. There is the further averment therein that some person or persons, under and by authority of plaintiff, have since the foreclosure of plaintiff's mortgage been in possession of the land in question.

The prayer of the cross-petition is, 1st., that plaintiff's petition be dismissed. 2d. That plaintiff's foreclosure proceedings be decreed to be null and void. 3d. That in case this relief be not granted them, that an account be taken of the rents and profits of the land and that defendant be permitted to redeem from plaintiff's mortgage by paying whatever may be found to be due thereon. We have stated the issues raised by the pleadings sufficiently to enable us to determine what we regard as the vital questions in the case.

I. It is urged that the court erred in sustaining the demurrer as against the denials of the answer, and in entering a decree without a trial. The decree is set out in the abstract, and in answer to the above objection, it is sufficient to say that it does not affirmatively appear from the decree that there was no evidence introduced at the hearing. It is recited in the decree that the issues are found for the plaintiff, and that the allegations of the petition are true. This would seem to imply that there was a trial upon the issues of fact.

II. By section 2685, of the Revision of 1860, which was in force when the plaintiff's foreclosure was had, a judge was disqualified from acting as such in any case where he had been an attorney for either party in the action, unless by the mutual consent of the parties. It does not appear that Collins, the party defendant to the foreclosure, appeared to the action. If he did not, but was in default, his default was an admission of the cause of action, and that something was due on the debt secured by the mortgage. Under these circumstances, the amount of the judgment is usually ascertained by the clerk, and the decree is entered as a matter of form. Besides this, it does not appear that Collins has ever

1. DECREE :
trial upon is-
sues of fact.

2. ———: not
void.

County of Floyd v. Cheney.

questioned the judgment and decree against him. We do not think the decree was void, presuming, as we may, that it was entered by default, or it may be by consent.

III. The important question in the case is that based upon the statute of limitations. The defendant held the junior mortgage or trust deed, and she foreclosed without making the plaintiff, who held the senior mortgage, a party to her action. After the foreclosure and the sale thereunder, and after she received her sheriff's deed, the plaintiff foreclosed its mortgage without making the defendant a party. It is admitted by the answer and cross-petition that Thompson has been and is now in possession of the land, under his contract with the plaintiff. Counsel for the defendant contends that the plaintiff's foreclosure did not affect the rights of the defendant, because she was not made a party thereto. This is undoubtedly correct. *Barrett v. Blackmar*, 47 Iowa, 565, and authorities cited. It is further contended that as the defendant had, by her foreclosure against Collins, acquired all the interest which Collins had in the land before the plaintiff commenced its foreclosure, the decree was invalid for any purpose, because the defendant had the legal title and was not made a party. We do not deem it necessary to determine this question. It is enough for the purposes of this case to hold that the decree did not affect the rights of the defendant as a junior mortgagee. The plaintiff, it is conceded, is in possession of the land by its agent, Thompson. Even if the foreclosure invested the plaintiff with no right to the land, it is, nevertheless, a senior mortgagee in possession of the mortgaged property. There is no way in which the defendant can acquire such possession, unless by redemption. The demurrer to the cross petition was properly sustained, because the action to redeem was barred, more than ten years having elapsed from the time the right of action accrued and the commencement thereof. This bar of the statute is in no wise affected by the question of adverse possession. *Gower v.*

3. — : sen-
ior and junior
mortgagees :
statute of
limitations.

The State v. Jay.

Winchester, 33 Iowa, 303; *Crawford v. Taylor Richards & Burden*, 42 Id., 260; *Smith v. Foster*, Id., 443.

The plaintiff being a mortgagee in possession of the property, and the defendant being the holder of a junior mortgage, all rights under which are absolutely and completely barred by the statute of limitations, her mortgage is not available to her, either for the purpose of maintaining an action to redeem, or as the ground of a right to obtain possession of the land.

AFFIRMED.

THE STATE V. JAY.

1. **Criminal Law:** INSTRUCTIONS: REASONABLE DOUBT. Where the instructions in a prosecution for a rape omitted to refer to the provision of § 4429, Code, and to state fully that where there was a reasonable doubt as to the degree of guilt, the defendant could be convicted of the lower degree only; *Held*, erroneous and prejudicial.

Appeal from Kossuth District Court.

TUESDAY, OCTOBER 25.

THE defendant was indicted for the crime of rape. He was convicted of an assault with intent to commit a rape, and he appeals.

H. H. Bush and *J. H. Hawkins*, for appellant.

Smith McPherson, Attorney General, for the State.

ROTHROOK J.—The court instructed the jury that if they found the defendant was not guilty of rape they should then proceed to determine whether he was guilty of an assault with intent to commit a rape, and that if they found that the defendant was neither guilty of a rape, nor of an assault with intent to commit a rape, they should then proceed to ascertain whether he was guilty of an

1. CRIMINAL
LAW: IN-
structions:
reasonable
doubt.

Robertson v. Anderson.

assault and battery, or a single assault. In the 13th instruction given by the court to the jury upon the point as to the reasonable doubt which entitles a party to an acquittal, no reference is made to the provision contained in section 4429 of the Code, that "when there is a reasonable doubt as to the degree of the offense of which the defendant is proven to be guilty he shall only be convicted of the lower degree." Indeed the instructions throughout are silent as to this rule of law. We think the defendant was entitled to full instructions upon the question of reasonable doubt, and such as were applicable to the character of the crimes included in the indictment, and that as the instructions omitted the important qualification, that a conviction could only be had for the highest crime included in that charged, of which there was no reasonable doubt of guilt, under the evidence, the omission was prejudicial to the defendant. See *State v. Walters*, 45 Iowa, 389.

Other objections to the rulings of the court are discussed by counsel which we do not regard as well taken. For the error in the instructions above pointed out the judgment of the District Court will be

REVERSED.

ROBERTSON V. ANDERSON.

1. **Taxation: ASSESSMENT: IMPROVEMENTS ON LAND.** While the improvements upon land, such as a patent limekiln and railroad switch, should be taken into consideration in determining the value of the land for the purposes of assessment and taxation, yet it is wholly immaterial whether the valuations of the land and the improvements are aggregated or stated separately.

Appeal from Madison Circuit Court.

TUESDAY, OCTOBER 25.

THE plaintiff is the owner of eighty acres of land, upon which there is a stone quarry, patent limekiln, and a railroad

Robertson v. Anderson.

track or switch, leading from the stone quarry and limekiln to the track of the Rock Island R. R. Co. The township assessor assessed the property for the year 1879 at \$15 per acre. The defendants, who are township trustees acting as the board of equalization, increased the assessment to \$30 per acre, on account of the patent limekiln, and ordered that the railroad switch be assessed at \$1,250. The plaintiff appealed to the Circuit Court, where a trial was had, and the court found as follows: "That \$15 per acre is a fair valuation to be placed on said real estate, taking into consideration the valuation for assessment purposes placed upon other lands of like character in the immediate vicinity. The court further finds that \$500 is a fair valuation to be placed upon the one-fourth mile of railroad switch assessed to S. A. Robertson, and that the defendants had the right to assess the same, and the court further finds that the limekiln, situated on the real estate herein described, should be valued and assessed at \$400." From this order the plaintiff appeals.

Ruby & Wilkin, for appellant.

A. W. Wilkinson, for appellee.

ROTHROCK, J.—I. It is claimed by counsel for appellant that the court erred in making a new and independent assessment upon the limekiln situated upon the premises. The argument is, that the limekiln cannot be treated as personal property, and an original assessment be made thereon by the Circuit Court upon appeal.

1. TAXATION:
assessment:
improvements on
land.

In answer to this, we think it is sufficient to say that while it would have been more regular if the Circuit Court had found that the land, without the limekiln, was worth \$15 per acre for the purposes of assessment and taxation, and that with the kiln it was worth \$400 more, making twenty dollars an acre, yet, we think the finding and order amount to this. The kiln

McClain v. McClain.

is not assessed as personal property, and even if it should be so entered on the treasurer's books, we are unable to see how the plaintiff can be prejudiced. The rate of taxation on real and personal property is the same.

II. It is not claimed that the railroad switch was returned to and assessed as railroad property by the executive council. It is owned by the plaintiff, and used by him for his own convenience. It is an improvement on his land proper, to be taken into consideration in determining the value of the land. This is what the court below and the board of equalization did in making the assessment, and it is wholly immaterial whether the values were aggregated or stated separately. In short, we cannot see how the defendant can be prejudiced by assessing his land at \$1,200, his limekiln at \$400, and his railroad switch at \$500, instead of aggregating it at \$2,100. In our opinion, \$2,100 valuation upon the whole property is not excessive under the evidence.

AFFIRMED.

McCLAIN V. McCLAIN.

1. **Trial de novo.** In this case, as no prejudice could result, the case was tried *de novo*.
2. **Express Trust: PAROL TESTIMONY.** An agreement to accept a conveyance in trust, and reconvey to the trustee, thereby creating an express trust, cannot be established by parol testimony.
3. —: **STATUTE OF FRAUDS.** Where the conveyance in trust was made voluntarily, without solicitation or undue influence, and no fraud is shown prior to or contemporaneous with the execution of the deed, but consists in denying and repudiating the agreement to reconvey, it will not remove the case from the operation of the statute of frauds.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 25.

ACTION in chancery to enforce a trust of certain land, the fee simple title whereof, it is alleged, was held by the defend-

57	167
90	582
57	167
92	620
57	167
94	239
57	167
100	295
57	167
104	586
57	167
116	399
116	391
116	391
57	167
121	398
121	398
121	490

McClain v. McClain.

ant in trust for the plaintiff. The relief prayed for in the petition is, that defendant be required to account to plaintiff for the proceeds of the land which has been sold. There was a decree dismissing plaintiff's petition, from which she appeals.

Seward Smith, R. N. Baylies, and James Embree, for appellant.

Bowen & Leavens, for appellee.

BECK, J.—I. The petition alleges that in 1860 the plaintiff's father owned one hundred and sixty acres of land in the state of Kansas, which he conveyed to defendant under an oral agreement that it was to be held in trust for plaintiff until she attained her majority, when defendant was to convey the land to plaintiff. It is alleged that by means of a fraudulent agreement of defendant, plaintiff's father was induced to convey the land to defendant and that the deed, through mistake, was not made to contain the agreement of defendant to hold the land in trust, but is absolute in form and conveys to defendant the fee simple title. The petition shows that defendant has conveyed the land to another, and prays that he may be required to account to plaintiff for the proceeds of the land with interest. The answer admits the sale of the land by defendant but denies all other allegations of the petition. It also pleads the statute of limitations.

II. The defendant insists that the case for various reasons, cannot be tried here *de novo*. As we reach the conclusion that the decree of the court below ought to be affirmed
1. TRIAL *de*
NOVO. upon the merits of the case, we will not examine the different objections urged against a trial *de novo* in this court. The parties cannot complain on the ground that the objections to a trial *de novo* are not considered by us. Plaintiff insists that the cause be tried here anew; we try it in that manner and her position is therefore sustained. Defendant objects to such a trial, but as we affirm the decree of the court below, he suffers no possible prejudice from the manner of trial.

Neither party can therefore complain on the ground that we disregard defendant's objections to a trial *de novo*.

III. The controlling facts in the case disclosed by the evidence are as follows:

In 1860 plaintiff's father conveyed to defendant, his uncle, by deed of warranty, reciting the consideration to be \$250, a quarter section of land in Kansas. The plaintiff shows by parol testimony that her father, for the reason that he had, or anticipated trouble with his wife, plaintiff's mother, was desirous of securing the land for the benefit of his daughter. He consulted with his father and proposed to convey to him the lands in trust for plaintiff. The father declined this proposition and suggested that defendant, his brother and plaintiff's uncle, would be a fit person to hold the land as trustee, and so recommended him to plaintiff's father. Thereupon with the consent of plaintiff's father he proposed to defendant that he should accept a conveyance of the land for the benefit of plaintiff. Defendant at first declined but afterwards assented and agreed to hold the land in trust as proposed by his brother. This was communicated to plaintiff's father and thereupon he executed the deed to defendant. There is testimony on the part of defendant in conflict with plaintiff's evidence.

IV. If it be conceded that the facts are as shown by plaintiff's testimony, she is not entitled to relief for the reason that

² EX PRESS TRUST: parol testimony. the trust she seeks to enforce is express in its nature and cannot, therefore, under the statute of frauds, be established by parol testimony. The familiar rule of law upon which this conclusion is based is not disputed by counsel for plaintiff. But they insist that the case is not within the rule for reasons which we will proceed to consider.

V. It is urged that the deed was executed by plaintiff's father through a mistake of fact, in that he believed that the defendant had made the promise to convey the land to plaintiff. If no such promise was made equity will hold the grantee to be a trustee. The position of plaintiff's counsel as to the

 McClain v. McClain.

question of law involved in this point may be correct but the fact upon which it is based is not found in this case. There was no mistake as to the existence of the agreement of defendant to hold the land in trust. All the evidence introduced by plaintiff tends to establish such an agreement. To deny it, would overthrow the very foundation of plaintiff's case.

VI. But it is insisted that if such an agreement be established, then defendant having obtained the title fraudulently, without payment of any consideration, will be held to his contract and will be regarded as a trustee. This proposition is based upon the thought that if defendant fraudulently induced plaintiff's father to convey the land by promising to hold it for plaintiff, a trust arises and the fraudulent promise may be shown by parol. But no facts upon which this position can be based are shown by the record before us. Defendant, it cannot be claimed, induced plaintiff's father to make the conveyance by promises of any kind. The deed was executed voluntarily and without solicitation on the part of defendant. No influence of any kind was exerted by defendant to induce the grantor to execute the deed.

The mere refusal of defendant to perform the contract, and his denial of its existence, however they may conflict with good morals and principles of honor, are not to be regarded as frauds which will authorize the court of chancery to enforce a parol contract for the creation of an express trust. The frauds having such an effect are those which induce a party to convey property to the trustee, or which consist in the refusal to execute defeasances or other instruments to witness the trust, or which secure the execution of an instrument different from the one agreed upon and the like. *Burden v. Sheridan*, 36 Iowa, 125; Brown on Statute of Frauds, sections 94, 439.

Little can be said against the doctrine and rules of law announced in the argument of the learned counsel for plaintiff. Indeed we think that they are all sound and have the support of the authorities. But the trouble with this case is that it can-

• Haverly v. Alcott.

not be brought within the circle of the facts to which these rules and doctrines are applicable. The case amounts briefly to this: The conveyance was made to defendant without any act or representation on his part inducing it. No fraud has been shown prior to or contemporaneous with the execution of the deed to defendant. His fraud consists in denying and repudiating his agreement to convey the land to plaintiff. However abhorrent this fraud may be in the eyes of honest men, yet it is not a ground upon which the case may be removed from the operation of the statute of frauds, so that parol testimony may be admitted to establish the agreement creating the express trust.

The decree of the Circuit Court is

AFFIRMED.

HAVERLY V. ALCOTT ET AL.

1. **Evidence: COMPETENCY OF.** Under § 3639, Code, where one party is dead, the other may give testimony as to all matters, except upon personal transactions between the two.
2. **Lis Pendens: CONSTRUCTIVE NOTICE.** A party purchasing land will be charged with notice of the pendency of an action affecting the same, from the time the petition is filed; and the facts that the action was not properly indexed in the appearance docket, and that the notice was not served until after the purchase, are immaterial.

Appeal from Folk Circuit Court.

TUESDAY, OCTOBER 25.

THIS is an action in equity to cancel certain conveyances of a lot in the city of Des Moines, and to quiet plaintiff's title thereto, upon the alleged ground that a deed made by the plaintiff to the defendant Alcott, was without consideration, and was obtained by fraud.

There was a decree for the plaintiff, and the defendant Geo. H. Gardier appeals.

57	171
84	681
57	171
110	599
57	171
4118	19

D. G. Edmundson, for appellant.

Chamberlain & Harvison, for appellee.

ROTHROCK, J.—I. It appears from the evidence that the defendant Alcott claimed to be agent of the United States Home and Dower Association of Pennsylvania, for the State of Iowa. That he represented to the plaintiff that said association was largely engaged in loaning money, and that it was doing an extensive business in this State. It further appears that said association had no financial standing or ability; that it had made no loans, and that it was an institution made up of false pretenses and promises. That plaintiff, believing that the representations of Alcott were true, and in reliance thereon, conveyed the lot in controversy to him in part payment for one-half interest in said agency for Iowa. The agency, by reason of the fraudulent character of the principal, was worthless. These facts are fully established by the evidence.

The defendant Alcott died before the trial in the court below. The plaintiff was examined as a witness in his own behalf. Objection was made to his testimony as being incompetent, under section 3639, of the Code. It is sufficient to say of this objection that the plaintiff did not testify to any personal transaction between Alcott and himself. This is the only restriction placed upon a party as a witness by the section of the Code under consideration.

One J. P. McDonald was examined as a witness for the plaintiff. He testified at length to conversations between himself, Alcott and the plaintiff. It is objected to his evidence that it is incompetent, because he was a joint owner of the lot in question, and joined the plaintiff in the conveyance to Alcott. But it appears from the evidence that he had no interest whatever in the contract between the parties, and no interest in this suit, that although he joined in the conveyance to Alcott, he had received from Haverly the consideration for

Haverly v. Alcott.

his interest "and then, for convenience, joined in the deed to Alcott." We are clearly of the opinion that the testimony was not incompetent under section 3639, of the Code.

II. The petition in this case was filed in the office of the clerk of the Circuit Court, on the 3d day of July, 1879.

2. LIS PENDING: CON-
structive notice.
It was duly entered in the appearance docket, and indexed directly in the name of the plaintiff, but not indexed reversely in the name of the defendants. On the 16th day of the same month, Alcott and wife conveyed the lot to defendant Landis by deed of general warranty. Two days afterward, Landis conveyed by deed of general warranty to one Edmunson, who was an innocent purchaser for value. He caused an abstract of title to be prepared before he purchased, which failed to show the pendency of this suit, and he had no actual knowledge thereof. Afterward Geo. H. Gardner, intervening defendant, purchased the property of Edmunson, and took a conveyance by deed of special warranty.

Section 2628 of the Code, is as follows: "When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title * *."

Section 197, sub. 7, provides that the clerk shall keep an appearance docket "with an index to the same, in which all actions entered in said docket shall be indexed directly in the name of each plaintiff, and reversely in the name of each defendant therein."

It is urged by appellant that his grantor, Edmunson, was not charged with constructive notice of the pendency of the suit, because the action was not indexed reversely. We can neither add to nor take away a positive provision of the statute. Section 2628 provides that third persons are charged with notice of the pendency of the action when a petition has been filed. When a pleading is delivered to the clerk, and a

Bennett v. Phillips.

memorandum of the date of the filing thereof made in the appearance docket, it is considered filed. Code, sections 290, 2643. The indexing in the appearance docket is no part of the filing. There is no analogy between these provisions of the statute and those which provide for the registry of deeds and other instruments affecting real estate. By the registry laws, notice is imparted by indexing. Code, § 1944. Notice of the pendency of an action is imparted by the filing of the petition.

The original notice in this action was not served until after Edmunson took his conveyance. This is immaterial. The service of an original notice has no connection with the filing of the petition, which, it appears to us, is the act which charges third persons with the pendency of the action.

The decree of the Circuit Court must be

AFFIRMED.

BENNETT V. PHILLIPS.

1. **Attorney: SPECIAL CONTRACT.** Where the evidence produced did not tend to show that there was a special contract of hiring an attorney for a special purpose, as alleged, the jury were properly directed to return a verdict for the defendant.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 25.

In the month of January, 1875, B. F. Allen, a banker at Des Moines, Iowa, closed the doors of his banking house and stopped the payment of claims against him. Shortly afterward his creditors filed their petition in bankruptcy against him in the U. S. District Court, and in April of the same year he was in said court duly adjudged a bankrupt. The plaintiff herein held Allen's certificates of deposit for several thousand dollars. On February 8th he delivered the same to Phillips & Phillips,

Bennett v. Phillips.

a law firm of which William Phillips, the defendant, was a member, and took a receipt for them in which it was recited that they were received "to file against the estate of B. F. Allen, bankrupt, as is alleged, and to obtain any dividend that may be allowed on same."

The certificates were filed by Phillips & Phillips, and Allen filed a petition for a discharge which was set for hearing December 3, 1875. The defendant William Phillips, in behalf of the plaintiff and other creditors appeared in resistance to the discharge, and fifteen days were given to file specifications in opposition to the discharge. On the 4th day of December, 1875, the opposition to the discharge was withdrawn and on December 6th an order of discharge was entered.

The plaintiff claims that the defendant's contract of employment bound him at all events to resist the discharge, and that he withdrew the resistance without the plaintiff's knowledge, and for this violation of the alleged contract damages are claimed.

Issue having been taken on the averments of the petition a jury was impaneled and the evidence in behalf of plaintiff having been introduced, the defendant moved the court to direct the jury to return a verdict for the defendant. The motion was sustained and the plaintiff appeals.

Baylies & Sickmon, for appellant.

Barcroft, Gatch & McCaughan, for appellees.

ROTHROCK, J.—There are charges made in the petition that the defendant was moved by corrupt motives to withdraw the opposition to Allen's discharge, and evidence was offered which it is claimed tends to support the charge. This is dwelt upon in a printed argument, and was elaborately discussed by appellant's counsel in an oral argument. In the view we take of the case no further reference need be made thereto here.

L. ATTORNEY:
special con-
tract.

Bennett v. Phillips.

The fullest latitude was given to the plaintiff to prove the special contract alleged—that is, that the defendant was employed to resist Allen's discharge, and a careful examination of the evidence as contained in the abstracts, filed by the respective parties, satisfies us that there was no evidence tending to show such a contract. It is true the plaintiff testified that the defendant said he could keep Allen from getting his discharge, and that the plaintiff said to "go ahead and do the best he could for him—that was all right, and what the plaintiff wanted." This is about as near as the evidence tended to show the special contract alleged. In the same connection, however, the plaintiff testified as follows: "I always told William Phillips (defendant), when I employed him to tend to anything, to use his own judgment, you know. I told him I didn't want to throw away good money for bad money." Without a further repetition of the testimony it is sufficient to say that its whole tenor was to the effect that the plaintiff put the certificates of deposit in the hands of Phillips & Phillips for collection, with the understanding and agreement that they were to use their judgment as to the steps necessary to be taken to effect the object.

The plaintiff having failed to produce evidence tending to show that there was a special contract as alleged, that is, that he hired the defendant to resist the discharge, the case was properly taken from the jury. We might say further, however, that a claim for damages for the breach of such a contract, in the face of the facts as shown by the evidence that some six hundred creditors of Allen were clamoring for the payment of over two millions of dollars, and the gross assets of the estate did not exceed \$350,000, would to say the least, be somewhat remote.

AFFIRMED.

Blair v. Wilson.

BLAIR ET AL. V. WILSON.

87	177
91	145
57	177
103	239
57	177
115	366

1. **DOWER: LIFE ESTATE: INTEREST OF HUSBAND.** Under the facts in this case; *Held*, that acceptance by the wife of a life estate in eighty acres, including the homestead, was not inconsistent with her right to dower; that possession of all the land during her life did not evince an election to take the homestead in lieu of dower; and that upon her death her second husband became entitled to one-third of her dower interest in the lands of her former husband.

Appeal from Madison District Court.

TUESDAY, OCTOBER 25.

THE essential facts in this case, and about which there is no dispute, are as follows:

Alexander Blair was seized in fee of about 210 acres of land. On the 2d day of December, 1874, he executed and delivered to Martha Blair, his wife, a deed for eighty acres of said land, to have and to hold the same during her natural life. The conveyance expressed a consideration of two thousand dollars, and is in the ordinary form of a warranty deed, excepting that it conveyed a life estate only. The dwelling house of the parties to the conveyance was situated on the land so conveyed, and they occupied the same as a homestead. They continued to reside thereon until October 4, 1876, when said Alexander Blair died, intestate. February 23, 1877, said Martha Blair intermarried with the defendant, James Wilson, and she died, intestate, in December, 1877. After the death of said Blair, his said widow continued to reside upon the homestead until her marriage with Wilson, and after that she and Wilson resided thereon until her death.

The plaintiffs are the heirs of Alexander Blair, and claim all of said real estate. The defendant claims that upon the death of said Blair his widow became seized in fee of one-third of said land as her dower in his estate, and that upon the death of said Martha, the defendant, as her husband, became seized

 Blair v. Wilson.

of the one-third of the interest owned by her as his dower or distributive share in her estate. The court below found that the defendant was not entitled to any interest in said land. The defendant appeals.

McCaughan & Dabney, for appellant.

M. Polk and A. W. Wilkinson, for appellee.

ROTHROCK, J.—I. In *Metteer v. Wiley*, 34 Iowa, 214, and in *Potter v. Worley*, *ante*, 66, it was held that where a husband devised his real estate to his widow during her natural life, such devise was not inconsistent with the dower right of the widow, in the land devised. So in the case at bar, the acceptance by the wife of the conveyance of a life estate in eighty acres of land is not inconsistent with her right to dower in the whole premises.

But it is claimed in behalf of appellees that the widow elected to take the homestead in lieu of dower. It is true, she remained in possession not only of the homestead, but of all the land during her life. But such possession in no manner evinced an election to take the homestead in lieu of dower. If her possession be claimed to have been under the life estate conveyance, it being for eighty acres, it cannot be said that by such possession she evinced an election to take the homestead, because the possession was not limited to the homestead. As the life estate in the eighty acres was not inconsistent with the right of dower, such right accrued at once upon the death of the husband. The legal title to one-third of the real estate vested immediately in the widow, and descended to her heirs, unless she was in some manner divested of it during her lifetime. *Potter v. Worley*, *supra*. It is said that she elected to take the homestead in lieu of the one-third in fee simple, and that such election was evinced by her occupancy of the homestead. But we have seen that her possession was not inconsis-

 Valentine v. Rawson.

ent with her right to one-third in fee. In *Butterfield v. Wicks*, 44 Iowa, 310, it is held that the surviving husband or wife cannot enjoy at the same time both dower and homestead, in the real estate of the decedent, and that continued occupancy of the property *as a homestead* will be regarded as an election to hold it as such. But in that case the only property left by the decedent was a homestead, and it was averred in the petition that the survivor occupied and possessed the property as his homestead from the death of his wife up to the commencement of the suit, a period of about ten years. The rights of the husband in that case were determined upon a demurrer to the petition. In the case at bar there was no such exclusive possession of the homestead forty acres.

We think the defendant is entitled to one-third of the dower or distributive share of the widow.

REVERSED.

 VALENTINE V. RAWSON ET AL.

1. **Mechanic's Lien: STATEMENT.** The statement for a mechanic's lien should set forth the time when the materials were furnished, and should show the account upon which the demand is founded. The simple statement that a certain sum is due is not sufficient.

Appeal from Guthrie Circuit Court.

TUESDAY, OCTOBER 25.

ACTION to enforce a mechanic's lien. There was a judgment for plaintiff. Defendant appeals.

I. B. Carpenter and Chas. S. Fogg, for appellants.

C. W. Weeks, for appellee.

BECK, J.—I. The petition alleges that plaintiff, under a contract with Rawson, furnished lumber for constructing a one-

57	179
88	527

Valentine v. Rawson. .

story frame dwelling house and fence, upon an eighty-acre tract of land, which is described according to the congressional subdivisions, and that a claim and statement for a lien was filed in the office of the clerk of the District Court, January 16, 1879. The petition does not attempt to state when the lumber was furnished, and when the improvements were commenced and completed.

Judgment was rendered against Rawson by default. The defendants, Whitmore and wife, answered the petition, denying its allegations and alleging that Whitmore is the owner of the premises, and that they were never owned by Rawson. Whitmore appeals.

The testimony shows that plaintiff filed in the office of the clerk of the District Court the following statement and claim for a lien:

"State of Iowa, Guthrie County, ss:

"I, William Valentine, first being duly sworn, depose and say that I, on the — day of — 1877, made a contract with William Rawson to furnish material for a certain dwelling house and fencing, situated upon the following described land, of which the said William Rawson was then and is now the owner of in fee simple, under contract of purchase, to-wit:

"South half of northwest quarter of section twenty-three (23), township seventy-eight (78), north range thirty-two (32), west 5th P. M., Iowa. That under and by virtue of said contract the said William Valentine furnished materials for said building, etc., as specified, and two several promissory notes were given by the said William Rawson to the affiant, as follows: one for \$77.41, dated July 4, 1877; one for \$106.58, dated January 18, 1878; at the respective dates, at and for the usual prices charged for such lumber material.

"And that said account is a just and true account for the materials furnished by said William Valentine, and that there is due and owing him thereon, after allowing all credits, the sum of one hundred and eighty-three dollars and ninety-nine

Valentine v. Rawson.

cents, for which said William Valentine claims a mechanic's lien upon the said building, including said land upon which the same is situated.

"[Signed]

WILLIAM VALENTINE.

"Subscribed and sworn to by William Valentine before me
in my presence this 16th day of January, 1879.



L. P. HAMMOND.

"Notary Public in and for Guthrie county, Iowa.

"Filed January 16, 1879.

W. H. CURTIS, Clerk."

II. Code, section 2133, provides that one who claims a mechanic's lien shall file in the office of the clerk of the District Court "a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed."

The paper filed by plaintiff fails to comply with this provision, in that it does not show when the lumber was furnished, and does not contain a "statement or account" of the demand due plaintiff. The simple statement that a sum is due plaintiff, for which promissory notes were given, is not the statement or account required by the statute. It should show the account whereon the demand is founded.

The statement in the paper filed that plaintiffs in the year 1877 entered into a contract to furnish materials does not tend to show when they were furnished.

The plaintiff should show by his claim that he is entitled to a lien, which depends upon the nature of his demand and the time when it accrued; these should therefore appear. We conclude that the law has not been so far complied with as to give plaintiff a lien.

REVERSED.

Haverly & McDonald v. McClelland.

HAVERLY & McDONALD V. MCCLELLAND.

1. **Clerk: NEGLIGENCE: APPROVING BOND.** Under the facts in this case, it was held that the court could not say, as a matter of law, the clerk was not negligent in approving the stay bond.
2. ———: ———. Where the clerk is negligent in approving a bond, he cannot afterwards demand the aid of the plaintiff in gaining information as to the responsibility of the surety.

Appeal from Polk Circuit Court.

TUESDAY, OCTOBER 25.

ACTION at law to recover for negligence of defendant, who was clerk of the District Court, in approving a stay bond. The case was tried to the court without a jury, and judgment rendered for plaintiff. Defendant appeals.

Barcroft, Gatch & McCaughan, for appellant.

Chamberlain & Harrison, for appellee.

BECK, J.—I. The petition alleges that plaintiffs recovered in the District Court of Polk county, a judgment against J. C. Saylor for about \$1,000; that defendant, as clerk of the court, approved a stay bond, whereby execution upon the judgment was stayed; that the defendant in the judgment was solvent, and the amount thereof could have been made by the sale of his property, had no stay been allowed; that the surety upon the stay bond was not the owner of sufficient property to secure the payment of the judgment as contemplated by law, and that defendant negligently approved the stay bond. It is shown that a part of the judgment remains unsatisfied and cannot be collected.

The defendant denies all the allegations of the petition charging him with negligence and liability. Other allegations are admitted.

II. The decision of the case turns wholly upon the facts.

Haverly & McDonald v. McClelland.

The sole question of fact is this: was defendant negligent in approving the stay bond? Upon this question, the most that can be said in favor of defendant is that the evidence is conflicting.

1. CLERK :
negligence :
approving
bond.

III. Defendant insists he exercised due care, and that the case is taken out of the rule of *Hubbard v. Switzer*, 47 Iowa, 681, for the reason that he made inquiry of the surety as to the value of his unincumbered real property, and was informed that it was nearly equal in value to the amount of the penalty of the bond. Certainly, as a matter of law, we cannot hold that the defendant was required to do nothing more than demand of the surety justification, and that he make oral statements of the value of his real estate, the amount of incumbrances thereon, etc., etc. If the justification of the surety under oath is not sufficient to exonerate the clerk, and we so held in *Hubbard v. Switzer, supra*, it cannot be insisted that oral statements to the same purport as his affidavit, would have that effect. Upon the testimony, the court was authorized to find that defendant was negligent. We cannot, therefore, disturb the verdict.

IV. The counsel of plaintiffs, it seems, complained to defendant upon the approval of the bond, of its insufficiency, and defendant informed him that he would disregard it and issue execution if plaintiffs would furnish evidence of its insufficiency. They did not do so, and made a motion in the court for additional security, and that in default thereof, execution issue. The motion was refused.

Defendant insists that this action of plaintiffs discharges him of liability on account of the insolvency of the surety. We think differently. Defendant was bound to know when he approved the bond that the surety was good. If he was negligent in failing to inform himself as to the sureties' responsibility, he was not authorized to demand the aid of plaintiffs in gaining information afterwards.

AFFIRMED.

Wilson v. Irish.

WILSON V. IRISH.

1. **CONVEYANCE: EQUITABLE TITLE: BREACH OF COVENANT.** The mere fact of the existence of an equitable title in a third person, cannot be set up in an action at law, as a breach of any of the usual covenants in a deed conveying the legal title.
2. ———: ———: **POSSESSION.** Where the covenantee takes, or has power to take, possession under his deed, he cannot complain of an outstanding equitable title, until it is successfully asserted.
3. ———: **SPECIAL FINDINGS: FRAUD.** The special findings of the jury construed as not constituting fraud, under the facts in this case.

Appeal from Van Buren Circuit Court.

TUESDAY, OCTOBER 25.

ACTION upon the covenants of warranty in a deed. The plaintiff claims damages in the sum of \$2,450. The defendant denies the breach of warranty. There was a trial by jury. Verdict for plaintiff for \$928.07. Defendant appeals.

Knapp & Beaman, R. Lea, William Moore, and Work & Brown, for appellant.

Robert J. Starr, M. J. Williams, and Trimble & Baldwin, for appellee.

ADAMS, CH. J.—I. The deed in question purports to convey certain land in the State of Missouri. It is conceded that the defendant was at one time the owner of the land. It is further conceded that he was the owner at the time of the execution of the deed to the plaintiff, unless he had executed and delivered a deed of the land to one Gatlin. The plaintiff avers that he had executed and delivered such deed. The defendant denies the delivery.

The undisputed evidence shows that an instrument was drawn for a deed from defendant to Gatlin, and deposited, with some other papers, in the hands of one Moore. Afterward it was surrendered by Moore at the request of both defendant and Gatlin. It was never

* 1. CONVEY-
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covenant.

Wilson v. Irish.

recorded, and at the time of the trial, was in the defendant's hands, and not in Gatlin's. The evidence offered for the purpose of showing a delivery is voluminous. Whether it had any tendency to show a delivery is the question principally discussed by counsel. In the view which we take of the case, we do not feel called upon to determine this question. It is one of considerable doubt, and the members of the court might not be agreed.

The evidence shows that Irish entered into a parol agreement with Gatlin for a sale to him of the land. Upon this evidence, the court gave an instruction in these words: "If you find that Gatlin and Irish made an agreement for the sale of the premises, and that the agreement was by parol, and that Gatlin paid to Irish a part of the consideration, either in money or property, and that a deed was executed and deposited with Moore, to be delivered to Gatlin upon his performing certain acts which it was agreed between them that he should perform, then this would vest in Gatlin an equitable title upon the performance of said conditions until said contract was rescinded and annulled by them, or the said Gatlin's right therein otherwise divested. And if such equitable right existed at the time Irish conveyed to the plaintiff, then there would be a breach of the covenants of the deed, and he would be entitled to recover the consideration paid for the premises."

The deed in this case contains all the usual covenants, and we have the question as to whether the mere fact of the existence of an equitable title in a third person can be set up in an action at law as a breach of any one of the usual covenants in a deed which conveys the legal title. In our opinion it cannot.

If the covenantee takes, or has the power to take, possession under his legal title, he has no ground of complaint until the
 2 ____: ____: equitable title has been successfully asserted, and
 possession. that could be done only in a court of equity. It
 is insisted to be sure that the plaintiff did not take possession,

Wilson v. Irish.

but was excluded by Gatlin. The evidence upon this point is by no means conclusive. On the other hand, it leaves our minds in great doubt. In our opinion, the instruction cannot be sustained as given, and we do not think it was without prejudice.

II. The defendant filed a cross-petition, claiming to recover damages for fraud in the trade, in pursuance of which the deed in question was executed. The defendant received from the plaintiff a deed of an improved farm in Iowa, which had been leased to one Brown. At the commencement of the negotiation the lease was shown to the defendant. Before the negotiations were closed, the plaintiff altered the lease by extending the time, and did not inform the defendant of the alteration. The rental value of the farm was greater than the rent stipulated in the lease. The defendant avers that the plaintiff extended the time for the purpose of defrauding him. The jury made a special finding upon the point in these words: "We find plaintiff practiced a deception, but no fraud." The defendant insists that if the plaintiff practiced a deception, he necessarily practiced a fraud, and that the verdict cannot be sustained. We have no doubt that the jury believed that the plaintiff misled the defendant by showing him the lease and afterwards, in good faith, no trade having yet been made with the defendant, consented to the change in the lease. That he did not intend to wrong the defendant would be evinced by the fact that the change, so far as it was disadvantageous, was in the first instance against himself, and would have remained so if the trade with the defendant had not been made. We think that the defendant's objections to the verdict, so far as it disallowed him damages for fraud, are not well taken. For the error above pointed out affecting the plaintiff's recovery, the judgment must be

REVERSED.

Herriman v. The B. C. R. & N. R. Co.

ON REHEARING.

ADAMS, CH. J.—The plaintiff insists that if there was error in the instruction held to be erroneous, it was error without prejudice, by reason of a special finding of the jury. Our attention is now called, for the first time, to this point. As the ruling made by us contains no bad law, and especially as the ruling does not dispose of the case, but simply remands it for another trial, we are disposed to let it stand. We reach this conclusion the more readily because some of the members of the court are in doubt whether the evidence is sufficient to support the verdict. The writer, indeed, would be better pleased to put the reversal upon that ground. But the majority prefer to adhere to the opinion filed.

HERRIMAN V. THE B. C. R. & N. R. Co.

1. **Railroads: STATUTE PENALTIES: LIMITATION.** An action under Chapter 63, acts 15th, General Assembly, to recover the "forfeiture" as provided therein, is an action to recover a statute penalty; that provision is criminal rather than remedial; and the limitation for the recovery of statute penalties applies.
2. —: —: **NOT BARRED.** Where the statute imposes two distinct, not alternative, penalties for the same act, the enforcement of one will not bar the enforcement of the other.
3. —: —: **FORFEITURE: LIMITATION.** The essential idea of "forfeiture" is a loss of property by way of punishment, and as used in the statute it indicates something more than compensation; and where so much of the claim as embraces a statute penalty is barred, the whole will be barred, for the same provisions of the statute of limitations must be applied to the entire claim.

Appeal from Fayette Circuit Court.

TUESDAY, OCTOBER 25.

THE plaintiff avers that in February and March, 1879, he shipped from West Union to Postville, Iowa, certain grain,

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57 187
106 241

Herriman v. The B., C. R. & N. R. Co.

seed and pork, over the defendant's road; that the defendant demanded of him and received as freight for such shipment, \$265.50 more than was allowed by law; that the defendant did so in violation of law to the damage of the plaintiff in five times the amount of the overcharge, to-wit, the sum of \$1,327.50, for which he asks judgment.

The defendant demurred to the petition on the ground that it showed that the recovery sought was for a statute penalty, and that the cause of action having accrued, if at all, more than two years prior to the commencement of the action, is barred by the statute of limitations. The court sustained the demurrer, and the plaintiff standing by his petition, judgment was rendered for the defendant. The plaintiff appeals.

Rickel, West & Eastman, and D. W. Clements, for appellants.

J. & S. K. Tracy, for appellee.

ADAMS, CH. J.—Action to recover a statute penalty must be brought within two years from the time the cause of action accrued. Code, § 2529. If the recovery sought in this case is for a statute penalty the action is barred. Whether the recovery sought is for a statute penalty is the question in the case.

The amount claimed which is precisely five times the alleged overcharge would seem to indicate that the action was brought under chapter 68 of the laws of the 15th General Assembly. We could not say absolutely from the petition that it was, but the counsel upon both sides have so treated the action in their arguments, and we think that we ought to assume that it should be so treated by us.

That statute fixed certain maximum rates of charges for transportation of freight and provided that a violation of the act by demanding more than the maximum rates should be deemed a misdemeanor, to be punished by a penalty of forfeit-

Herriman v. The B., C. R. & N. R. Co.

ure of five hundred dollars to the school fund. It also provided that for a violation of the act the company should "forfeit and pay to the person injured five times the amount of compensation or charges illegally taken or demanded, or five times the amount of damages caused as the case may be," etc.

The plaintiff insists that notwithstanding the use of the word "forfeit" the action is to be regarded as brought for indemnity, and that the provision allowing a recovery of five times the amount of the overcharge was designed merely to fix the measure of the plaintiff's indemnity. He relies on *Koons v. Chicago & N. W. Railway Company*, 23 Iowa, 493. That action was brought under the statute allowing double damages for stock injured where a notice has been given, etc. The action not having been brought within two years from the time the cause of action accrued, the defendant claimed that the action was barred. The question presented was as to whether the recovery sought was for a statute penalty, and it was held that it was not.

It appears to us, however, that there is a marked distinction between the statute under which that action was brought and the statute under which this is brought. In that case the court said: "This law does not give to the injured or aggrieved party a fixed statutory recompense for the wrong, but without speaking of forfeiture or penalty, gives damages to the extent of the injury, and, in action brought, double that amount for the neglect or refusal to pay after due notice." The court further said: "It is well to remember that the amount of injury in these cases is usually not large, and that the expense of litigation is frequently as great as the value of the property destroyed. The purpose of the statute was compensation to the owner rather than the punishment of the company. If a case arises entitling a party to relief, simple, actual compensation is all that the company is required to make if it shall comply with the owner's demand. If it resists, however, his claim af-

1. RAIL-
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limitation.

ter due notice, and he shall be compelled to resort to the court, then his compensation is to be double this amount." We have quoted somewhat fully in order to set forth the principles upon which the decision was deemed to rest. It will be seen that the fact that neither the word *forfeiture* nor *penalty* was used was deemed significant. The statute under which the present action is brought expressly provides, that the company shall pay the amount recoverable as a forfeiture. Again the double damages for injury to stock are allowed by reason of the neglect to pay single damages. The design is, as the court thought in the case cited, to stimulate the company to the payment of the single damages without delay or litigation. The forfeiture under the statute in question takes place immediately upon the overcharge being made, and because a misdemeanor has thereby been committed. No offer to refund the amount of the overcharge would prevent the enforcement of the forfeiture. This to our mind shows very clearly that the essential object of the provision was not to afford the aggrieved individual an adequate remedy, but to protect the public by deterring railroad companies from committing the misdemeanor which a violation of the act was declared to be. The provision then is essentially criminal rather than remedial. This is sufficient to enable us to determine what statute of limitations applies. We might concede that the provision has a remedial element in it, but that would not change the case if such is not the essential element.

But it is urged by the plaintiff that if the provision is to be regarded as criminal, then an action in the name of the State ^{2. —; —;} to enforce the forfeiture provided in behalf of the school fund, should be held to be a bar to an action to enforce the forfeiture provided in behalf of the aggrieved individual.
not barred.

But where the statute imposes two distinct penalties for the same act, as in this case, and the penalties are not alternative, the enforcement of one should not, we think, prevent the

Herriman v. The B., C. R. & N. R. Co.

enforcement of the other. In our opinion the demurrer was properly sustained.

AFFIRMED.

SUPPLEMENTAL OPINION.

ADAMS, CH. J.—A petition for a rehearing having been filed, we have re-examined the case in the light of it, and have to say that while many considerations of no little weight are urged in favor of a reversal, we feel reasonably satisfied with the conclusion reached, and think that the petition must be overruled. We deem it proper, however, to add a few words to what we have already said:

In holding that the recovery sought is for a statute penalty we do not claim that the ruling can be supported by reasoning, a ———: forfeiture: limitation. having the force of a mathematical demonstration. The recovery given, is given to the aggrieved party, and was doubtless designed to cover the damages sustained by him, and bar any other recovery. Looking at the provision in this aspect simply, it would seem to be remedial. And while the word *forfeit* is used, it has been held that the use of such word does not prevent the recovery from being regarded simply as a remedy. *Stockwell v. United States*, 13 Wall., 531. Yet we think that it cannot be denied that the essential idea of forfeiture is a loss of property inflicted by way of punishment. See Bouviers' Law Dictionary, and cases cited. In confirmation of this view we showed that this court in *Koons v. C. & N. W. R. Co.*, had deemed the absence of the word *forfeiture* significant as indicating that punishment was not intended; and so we thought that the same court should deem the presence of the word significant as indicating that punishment was intended. Because one legislative body has departed in the use of the word from its strict meaning, and used it without intending punishment, it does not follow that our legislature made the same departure. We cannot hold that it did, unless the whole provision taken together

Herriman v. The B., C. R. & N. R. Co.

would so indicate. Now, when we come to look into the statute, we find the recovery given a very extraordinary one, if regarded as intended to be mere compensation. Double damages, as in *Koons v. Railroad Co.*, may well enough be held to be intended as mere compensation, but it does not follow that quintuple damages could be so held with the same propriety. We do not say that the size of the multiple is to be urged as conclusive. Probably it should not. The most that we can say is, that taking the provision altogether we cannot divest our minds of the conviction that something more than compensation was intended—something by way of punishment to secure compliance with the law. If we are correct, then the plaintiff is seeking to recover something as a statute penalty, and he should, we think, have brought his action within the shorter period of limitation.

At this point we are met with the proposition that while it may be true that so much of the plaintiff's claim as embraces a statute penalty may be barred, yet the whole is not barred, and, therefore, the demurrer was improperly sustained. To this we think that it may be said that the claim must be regarded as a unit, and we cannot apply one provision of the statute of limitations to one part of it and another provision to another part.

Rivers v. Mitchell.

RIVERS v. MITCHELL.

1. **Habeas Corpus: JURISDICTION.** The allegations of the petition for a writ of *habeas corpus*, that minor children were concealed by the respondent in Polk or Dallas counties, were sufficient to give the court of Polk county jurisdiction, and authorized the issuance of the writ; and the fact set up in the answer, that the children were in a foreign jurisdiction did not deprive the court of jurisdiction, or excuse the respondent for not producing the children in court in obedience to the writ.
2. ———: ———: **RETURN.** The return to the writ of *habeas corpus*, should have shown that the respondent did not have the power to produce the children in court, in obedience to the writ.

Certiorari to Polk Circuit Court.

TUESDAY, DECEMBER 6.

ON the 10th day of July, 1880, there was filed in the court below a petition in *habeas corpus*. It appears from the allegations thereof that the plaintiff herein and Sophia B. Rivers are husband and wife; that they have two minor children of tender years, one being about nine years old and the other younger. That a separation of the husband and wife had taken place on account of the gross neglect of the husband to provide for his family. That the children were taken by the wife from Des Moines (the home of the parties), to her father's residence at Oskaloosa, in May, 1879, and that she and the children remained there until July 2, 1880, when said John D. Rivers, in the night time, secretly and without the knowledge or consent of his said wife, removed and carried away said children and concealed them from their mother. The petition is entitled in the name of the children, by Sophia B. Rivers, their natural guardian, and avers that according to the best belief of petitioner the said children were concealed by said Rivers in or near the city of Des Moines, or in the counties of Dallas or Polk. Mrs. John Rivers, the mother of John D. Rivers, was also made a defendant. It is claimed that the mother of said children is entitled to their custody and care.

Rivers v. Mitchell.

The writ of *habeas corpus* was issued, and said Rivers in addition to a general denial answered thereto to the effect that he had possession and control of said children, but that on the 5th day of July, 1880, he transferred said control to Mrs. John Rivers, his co-defendant, and that she and said minors have been non-residents of this State and have not been within the State, and he has had no control nor possession of them since his transfer of them to his co-defendant. It elsewhere appears in the record that the children were in the State of Missouri, at a place about five miles south of Cincinnati, in Iowa.

The petitioner moved the court to strike the answer from the files, because the same was equivocal and not responsive to the petition. The motion was sustained, and the defendant was given until the next day to make further pleading. On the next day, he filed a motion for a change of venue, and a motion to dismiss the proceeding for want of jurisdiction. These motions were overruled. On the 14th day of July, 1880, an order was made finding that said Rivers had willfully disobeyed the writ by refusing to produce the said minor children, and he was committed to the jail of the county until he should comply with said writ and produce said minors in open court.

Thereupon the said Rivers applied for and obtained a writ of *certiorari* from this court for a review of said proceedings.

C. C. Cole, for plaintiff.

George H. Lewis, for defendant.

ROTHROCK, J.—I. It is claimed that the judge of the Circuit Court at Des Moines did not have jurisdiction to issue the writ, because the application was not made to the court or judge most convenient in point of distance to the applicant, as provided in section 3452, of the Code. In *Thompson v. Oglesby*, 42 Iowa, 598, it was held that the person restrained is the applicant. As we understand it, the

1. HABEAS
CORPUS:
jurisdiction.

residence of John D. Rivers was at Des Moines, in Polk county. The petition charges that the children were to the best belief of the petitioner in Des Moines, or in Polk county or in Dallas county. This was sufficient to authorize the issuance of the writ. Indeed, if it were only alleged that John D. Rivers was in Polk county, and that he unlawfully restrained the minor children, the presumption would be that he and the children were together. *Thompson v. Oglesby, supra.*

The court then having had jurisdiction to issue the writ, did the answer show facts sufficient to oust the jurisdiction? Or rather, did Rivers show good cause for not producing the children in court, as provided in section 3475, of the Code? We think he did not. These contests between husbands and wives, who are living separate and apart from each other, as to the custody of their minor children are peculiar. Although denominated proceedings in *habeas corpus*, they are unlike the ordinary proceedings for the release of a party held upon a criminal charge. Although the minor child is denominated as the applicant for the writ, no contest is made by him. It is really a controversy between the father and mother, and the question for the court to determine is, which of the contestants is the more suitable person to have the control and custody of the child. It was incumbent on Rivers to show good cause for not producing the children in court, in obedience to the writ. They were presumably in his custody, and we think the court properly found that they were not beyond his control. He made no showing that he could not obey the writ. The mere fact that he put them in possession of his mother, who took them over the State line and into Missouri, is no showing of an inability to produce them. For aught that appears, he had the same power to bring them into the State that he had to send them over the state line and into the State of Missouri. Without some other showing than what was made, we think the court may have fairly found that the minors were taken out of the State for the very purpose of evading

any proceeding which the mother might institute to regain the custody of them.

The plaintiff claims that the mere fact that the children were in a foreign jurisdiction when the writ of *habeas corpus* was issued deprives the tribunals of this State of power to inquire into the cause of their restraint. The case of Jackson, 15 Mich., 416; is cited and relied upon as authority for the claim so made. In that case it appeared that Samuel W. Jackson, a minor, was taken out of the State of Michigan by the wife of the respondent several months before the writ of *habeas corpus* was issued; that the wife remained out of the State with the minor, and that she had been duly appointed guardian of the minor by the Surrogate's Court of Canada West, and that the minor was not under the control of the respondent. The court was equally divided upon the question as to whether or not the mere fact of the absence of the child from the State was a sufficient excuse for not producing him in obedience to the writ. All of the judges were agreed, however, that the fact of the appointment of a guardian in a foreign jurisdiction should be regarded as a sufficient showing that the minor was beyond the control of the respondent. Upon the main question, we think the opinion of Mr. Justice Cooley, holding that the mere fact that the child was in a foreign jurisdiction, is not a sufficient excuse for, not producing him in obedience to the writ, is in accord with sound legal principles. In discussing the question, he very pertinently says: "The place of confinement is therefore not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the State, except as the greater distance affects it. The important question is, where there is the power of control exercised?"

In *U. S. v. Davis*, 5 Cranch., C. Ct., 622, it was held that a

The First National Bank of Davenport v. Baker.

return to a writ of *habeas corpus* that the person alleged to be
 2 — : — : detained was not within the control and custody
 return. of the party to whom the writ was directed, and
 that such person was beyond the jurisdiction of the court, was
 evasive and insufficient, it appearing that such person had been
 removed, in anticipation of the issuing of the writ, by the
 party to whom it was directed.

In the matter of Samuel Stacey, 10 Johnson, 327, the re-
 turn was, "that the within named Samuel Stacey is not in my
 custody." This was held to be an evasive return, because it
 was not shown that Stacey was not in possession or power of
 the respondent. So in the case at bar, the return should have
 shown that Rivers did not have the power to produce the
 children in court in obedience to the writ.

The writ of *certiorari* will be dismissed, and the order of
 the court

AFFIRMED.

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104	258
57	197
121	351

THE FIRST NATIONAL BANK OF DAVENPORT V. BAKER ET AL.

1. **Homestead: LIABILITY FOR DEBT: BURDEN OF PROOF.** In an action to subject a homestead to the payment of a debt contracted prior to its purchase, the burden of proof to show that it was purchased with the proceeds of the sale of a former homestead, and therefore exempt, is upon the defendant.

Appeal from Jasper Circuit Court.

TUESDAY, DECEMBER 6.

THIS action was brought by the plaintiff as execution creditor of the defendant, Geo. W. Baker, to subject to the payment of the judgment certain premises occupied by the defendant, Geo. W. Baker and his wife, the defendant Hannah Baker, as a homestead. The petition admits the homestead character of the premises, but avers that they are liable to execution upon

The First National Bank of Davenport v. Baker.

the judgment because they were purchased by the defendant subsequently to the contraction of the debt upon which the judgment was rendered. The defendants deny that the premises are liable to execution upon the judgment. They admit that they were purchased subsequently to the contraction of the debt, but they aver that the purchase was made with the proceeds of a former homestead, which they owned and occupied as such, prior to the contraction of the debt.

The case was submitted upon the pleadings, and the plaintiff's petition was dismissed. The plaintiff appeals.

Geo. E. Gould, L. M. Fisher and S. S. Patterson, for appellant.

Ryan Bros., for appellee.

ADAMS CH., J.—The only question presented in this case is as to whether the plaintiff had the burden of proving that the premises in question were not purchased with the proceeds of a former homestead, or whether the defendant had the burden of proving that they were. The defendants contend that the burden was on the plaintiff because the present homestead character being admitted, the premises were exempt unless they were purchased subsequently to the contraction of the debt, and unless also they were not purchased with the proceeds of a former homestead, which, if it had been retained, would have been exempt.

If the defendant's position is correct, then strictly the plaintiff should have averred the negative fact that the premises were not purchased with the proceeds of a former homestead, which would have been exempt if retained, and inasmuch as such negative fact was not averred, the petition should upon their theory be regarded as demurrable. But in our opinion the defendants' position cannot be maintained. They do not,

The First National Bank of Davenport v. Baker.

indeed, seem to have taken that view themselves in the outset. They not only did not demur to the petition for want of averment of the negative fact, but they averred in their answer the affirmative fact that the premises were purchased with the proceeds of a former homestead which would have been exempt if retained.

There was, it is true, a practice in equity of introducing into the bill what was called the charging part, wherein the plaintiff would set out the defenses which he anticipated that the defendant would make, and deny the truth of the supposed matters, or set up facts in avoidance. Story's Eq. Pleadings, section 31. That was never, however, the correct practice at law (1 Chitty's Pleading, 222), and under Code practice the practice in equity has in this respect been assimilated to practice at law. Bliss on Code Pleading, section 200. Our Code, section 2646, sub. 3, makes one provision for the statement necessary to be made in a petition, whether it be at law or in equity, and that is that it shall be a statement of the facts constituting the cause of action. When the plaintiff in the case at bar had set out its judgment in its petition, and averred that the premises in question, although the homestead of the defendants, were liable because they were purchased since the contraction of the debt, it showed a *prima facie* cause of action; and that was all that was necessary. Where a person as payee of a promissory note brings an action thereon against the maker, and avers the execution, delivery and non-payment of the note, he shows only a *prima facie* cause of action. But that is sufficient. He is not bound to aver that the maker was not an infant, nor that the note was not obtained by duress, nor anticipate any one of the defenses which if made and proven would be sufficient to avoid the note.

The general rule is that the debtor's homestead is not liable to execution. To this there is the exception that it may be sold for a debt contracted prior to its purchase. The plaintiff by its averment brought itself within the exception, and show-

ed a *prima facie* right to proceed against the premises. The provision of section 2001 of the Code, upon which the defendants rely, is in the nature of an exception to the exception upon which the plaintiff relies. It was incumbent upon them therefore to aver what they did aver, and that is, the facts which brought themselves within the exception. Code, § 2711. The propriety of the rule as applicable to this case is made clear by considering that the facts relied upon by the defendants are peculiarly within their knowledge. To hold that the burden in such a case is upon the creditor to prove that the premises in question were not purchased with the proceeds of a former homestead would often prove exceedingly oppressive.

The point upon which the defendants seem principally to rely is that as the plaintiff averred that the premises were liable to execution, and the defendants denied it, an issue was thereby formed which involved the whole merits of the case, and of that issue the plaintiff had the affirmative.

But it is plain to be seen that both the averment and the denial involved mere conclusions of law. That the defendants cannot rely upon their denial becomes clear by considering that the plaintiff averred facts which supported its conclusion in regard to the liability of the premises, which facts the defendants admitted. With these facts admitted by the defendants, their denial went for nothing.

It appears to us that upon the pleadings the plaintiff was entitled to judgment, and that the court erred in dismissing its petition.

REVERSED.

Rush v. The B., C. R. & N. R. Co.

57 201
103 636

RUSH ET AL. v. THE B., C. R. & N. R. Co.

1. **Tenants in Common : DEED BY ONE: DAMAGES.** Where one of two tenants in common deeded the right of way through their premises to a railroad company upon certain conditions, and the company entered but failed to comply with the conditions, the tenant granting the deed can maintain an action to recover damages for the breach of contract, and the other, the entry being without her consent, for the trespass.

Appeal from Hardin District Court.

TUESDAY, DECEMBER 6.

A DEMURRER to plaintiffs' petition was sustained by the court below and a judgment rendered for defendant. Plaintiff appeals.

J. H. Scales, for appellants.

J. & S. H. Tracy, for appellee.

BECK, J.—I. The petition alleges that plaintiffs are the owners and tenants in common of certain land in Hardin county; that plaintiff, Joseph Rush, executed to defendant a deed for the right of way of its railroad over the land in consideration of the undertaking of the defendant to erect a depot at a certain point, construct certain crossings, to fence the railroad upon plaintiff's land, and to build it upon a line in a certain direction, and that defendant has built the road upon plaintiff's land but has failed to perform its contracts just stated. It is alleged that plaintiff, Elizabeth Rush, had no knowledge of the deed executed by her co-plaintiff, and did not assent thereto.

Plaintiffs ask that the deed for the right of way be reformed if necessary, so as to express its true consideration, and that judgment be rendered for the damages sustained by plaintiffs by reason of the construction of the railroad upon their land.

The defendant demurred to the petition on the ground that

Rush v. The B., C. R. & N. R. Co.

it does not state facts which entitle plaintiffs to relief and that the action to recover the right of way appropriated by defendant cannot be maintained, as the exclusive remedy of plaintiffs is an *ad quod damnum* proceeding. The demurrer was sustained and plaintiffs standing upon their petition, judgment was rendered for defendant.

II. In our opinion the demurrer was erroneously sustained. The action as to Joseph Rush is to recover upon defendant's contract set out in the petition, which, plaintiffs
1. TENANTS
in common :
deed by one :
damages. allege, the defendant has wholly failed to perform. The defendant entered the land under this contract, and plaintiff, Joseph, may maintain an action to recover damages for its breach. And so far as his rights are concerned this action seeks that remedy.

III. The petition alleges that the defendant entered upon the land without the consent of plaintiff, Elizabeth. As to her it was a trespasser and she may maintain an action to recover the damages to which she is entitled by law. This case does not present the question involving the amount of such damages. See *Hibbs v. The C. & S. W. R. Co. et al.*, 39 Iowa, 340; *Donald v. The St. L., K. C. & N. R. Co.*, 52 Iowa, 411, and cases therein cited.

The petition in our opinion sets out facts whereon each plaintiff may maintain an action and recover. The demurrer, therefore, should have been overruled.

The demurrer does not raise the question whether plaintiffs may join in this suit upon their respective causes of action as set out in the petition. We cannot, therefore, consider it.

REVERSED.

Hopkins v. The Hawkeye Insurance Company.

HOPKINS V. THE HAWKEYE INSURANCE CO.

57 203
98 78

1. **Promissory Note: SIGNING: NEGLIGENCE.** What constitutes reasonable care and diligence in the execution of an instrument is ordinarily a question of fact for the jury. Where a party trusts to the agent of the payee to read a note correctly, without calling upon a member of his family to read it for him before signing, it is not, as a matter of law, negligence.
2. —: **AGENT: FRAUD.** The fraudulent acts of an agent, committed in the direct line of his employment, will render the principal liable.
3. —: **PAROL PROOF.** It is competent to show by parol, that because of the fraud of a party to an instrument, it does not express the real agreement.
4. —: **DEFENSE: RECOVERY.** Whatever the defense relied upon, the plaintiff cannot recover more than, by his own showing, he is entitled to.

Appeal from Hardin Circuit Court.

TUESDAY, DECEMBER 6.

THIS is an action upon a policy of insurance to recover the value of a dwelling house and its contents insured by the defendant for a term of five years from the 7th day of May, 1878, and destroyed by fire on the 8th day of April, 1879. The plaintiff alleges that as the assured under said policy he has in all things performed his agreement with the defendant. The answer admits the issuance of the policy and the destruction of the building, but alleges that the entire premium for the issuance of said policy was two promissory notes, one for the sum of \$20, due January 1, 1879, and one for the sum of \$10.80, due November 1, 1879; that the note payable January 1, 1879, was overdue and unpaid when the loss occurred, whereby a breach of the plaintiff's contract was committed, and the policy was rendered void. The plaintiff for reply admits that he executed two promissory notes of the amounts alleged for the premium on said policy, and that neither of said notes had been paid when the loss occurred. The plaintiff al-

Hopkins v. The Hawkeye Insurance Company.

leges that it was agreed between him and the defendant's agent, at the time the insurance was effected, that the note for \$20 should become due on the first day of June, 1879, that the defendant's agent prepared the note and read it to the plaintiff as payable on the first day of June, 1879; that the plaintiff relied upon the defendant's agent to fill out the note in accordance with the agreement, and that his signature was obtained to said note by the mistake or fraud of the defendant's agent in drawing the note as due January 1, 1879, and reading it to plaintiff as due June 1, 1879. The trial was to a jury and resulted in a verdict and judgment for the plaintiff for \$1,158.27. The defendant appeals.

Porter & Moir, for the appellant.

Huff & Reed, for the appellee.

DAY, J.—I. The policy sued upon contains the following condition: "That no insurance, whether original or continued, shall be binding until the actual payment of the premium, either in cash or note given therefor. When a note or notes has been received, in whole or in part, for the premium named in this policy, or any renewal of the same, and the assured or his assigns fail to pay the same, or any installment, or any part thereof, at the time or times specified in said note, such failure shall immediately terminate all liability of this company under this policy. And the company shall not in any case be liable for any loss or damage that may occur at a time when any such note or notes, or any installment therein, or any part thereof, shall be overdue and unpaid. If such note or notes, or installment, is voluntarily paid within sixty days after maturity and before suit is brought, then the policy will come in force again at the date of such payment (provided that the company will not be liable for any loss or damage that may occur while such note or notes were thus overdue and unpaid), but if said note or notes, or any installment are

Hopkins v. The Hawkeye Insurance Company.

not then voluntarily paid within sixty days after maturity, then all notes and installments given for such premium, or any part thereof, shall immediately become due and payable and bear interest at the rate of ten per cent from that date." The plaintiff paid no cash premium at the time the insurance was effected. The note for \$20 is by its terms due on the first day of January, 1879. It had not been paid when the loss occurred, April 8, 1879, and was, therefore, by its terms, more than three months over-due.

The plaintiff testified as follows: "Mr. H. H. Clark came to my house and wanted to insure it, and he offered to insure it and take my note for one year. This was on the 7th day of May, 1878, and after talking some time I agreed to insure the house with him. He said they always wrote their notes payable on the first day of some month, and he should write the notes payable the first day of June, 1879. A few days before that I was in town and lost my spectacles, and Mr. Clark read the note to me, and he read it due the first day of June, and I did not notice it; didn't think there was any catch to it, and after he read the notes payable at Des Moines, I asked him how I should pay them, and he said I shouldn't trouble my head about it; that they would send me a notice before how I should send the money." Upon cross-examination the witness stated: "I signed the application at home; my wife and son were present when I signed it. My son was nineteen years old last December, and he is present as a witness in this case. My wife has never used spectacles until within a year. She could read writing and printing in April, 1878, without spectacles."

Mrs. O. W. Hopkins, the wife of plaintiff testified as follows: Mr. Clark, the agent, was to take a note, and the note was written May 7, payable the 1st day of June, 1879. He so read it. It was to be made payable the 1st day of June, 1879. That was the talk before the note was executed. Neither of us read the note. Mr. Clark read the note. We put confidence in

Hopkins v. The Hawkeye Insurance Company.

him. He held it in his hand and put it in his pocket. He was a friend of ours and neither of us looked at it. My husband could not read without glasses, and he had lost his."

Herbert Hopkins testified as follows: "I am a son of plaintiff. I was at home May 7, 1878, and remember about Mr. Clark, agent of the Hawkeye Insurance Company, being there. Was there when the notes and application were signed, and heard them read to my father, and heard a conversation between the agent and father as to when the \$20 note should mature."

Q. What was said between the parties as to when that note was to mature?

A. The 1st of June, 1879.

Q. How was it read as to the time it matured?

A. First of June, 1879.

Upon cross examination the witness testified as follows:

Q. You could read printing and writing readily at that time?

A. I certainly could.

Q. Did your father ask you to read these notes or either of them?

A. No sir, he did not.

The defendant asked the court to instruct the jury as follows: "It was the duty of the plaintiff, O. W. Hopkins, to have read the notes and application signed by him on the 7th day of May, 1878, and if he was unable to do so because of having lost his spectacles, then he should have requested his wife or son to have read the same in his hearing, if they were present at the time, and if he failed to exercise such degree of diligence as above indicated, he was guilty of negligence, and is estopped to controvert the terms and conditions of said note and application in this action." The refusal to give this instruction is assigned as error. It is to be observed that the question as to the alleged fraud in procuring the note arises in this case between the original parties to it, and not between the maker and a *bona fide* indorsee for

1. PROMISSORY
NOTE: sign-
ing: negli-
gence.

Hopkins v. The Hawkeye Insurance Company.

value. In the case *Rogers v. Place*, 29 Ind., 577, it was held that "In the absence of any device to put the party off his guard, an omission to read the instrument by one having the capacity to do so, will place him beyond the protection of the law." To the same effect see the case *Lubright v. Fletcher*, 6 Blackford, 380; *Nebeker v. Cutsinger*, 48 Ind., 436; *McCormack v. Molburg*, 43 Iowa, 561. It is incumbent upon the party executing an instrument to exercise reasonable care and diligence to ascertain its contents. Ordinarily, however, what constitutes reasonable care and diligence is a question of fact, to be determined by the jury in view of all the circumstances. In this case the plaintiff was unable to read the note on account of the absence of his spectacles. Whether he was justified in relying upon the reading of the agent, and in neglecting to call upon his wife or son who were present, constitutes not a question of law but one of fact. The question is "did he act as persons of reasonable and ordinary care would usually do under like circumstances?" If he did he was not negligent. The evidence shows that the plaintiff had known Clark, the agent, for years, and had confidence in him. Whether he should have indicated the lack of confidence in Clark, which would have been implied in his calling upon his wife or son, was for the jury to determine. It cannot be declared that, as a matter of law he was negligent in not doing so. This case is very like *Griffith v. Kellogg*, except that in that case the action was brought by an assignee for value. In that case the defendant's signature was procured to a note for the sum of \$76.25, which was read by the agent procuring it as for \$47.50. The defendant was unable to read the note without her glasses, which were at a neighbor's. Two of the defendant's children were present who could read writing, but she did not ask them to read the note before she signed it. Judgment was rendered for the defendant in the court below, which, upon appeal, was affirmed. The court say: Whether the respondent, being un-

Hopkins v. The Hawkeye Insurance Company.

able to read the paper which she signed, was guilty of negligence to estop her from setting up this defense against a *bona fide* purchaser, was fairly submitted to the jury, and answered by their verdict for her. The jury who gave the verdict and the learned judge of the court below who refused a new trial, saw and heard the respondent and her children testify, and were better able to judge than we are whether her not appealing to her children for assistance was negligence under the circumstances." See also *Taylor v. Atchison*, 54 Ill., 196; *Walker v. Ebert*, 29 Wis., 194. In our opinion the court did not err in refusing to give this instruction. The court correctly instructed the jury that whether the plaintiff was justified in trusting the agent to read the note correctly before signing it, or should have called upon the members of his family then present to read it for him, was a question of fact for them to determine from all the circumstances, and that he was required to do as a man of reasonable prudence would have done under like circumstances. This instruction properly presents the law upon this question.

II. It is urged by the appellant that it is not liable for the fraudulent acts of the agent. In taking the application the
2. ———; agent had authority to accept a note for the pre-
agent: fraud: mium. He had authority to take a note payable on the first day of June as well as upon the first day of January. What he did in regard to taking the note was in the direct line of his employment, and his acts in regard thereto must be considered as the acts of his principal. The case differs from *Gakey v. Knapp*, 44 Iowa, 32, cited and relied upon by appellant. The act of the agent in that case was outside of the general scope and purpose of his employment.

III. It is claimed that the court erred in admitting parol evidence of the terms of the contract entered into between the
3. ———; plaintiff and the defendant's agent. It is insisted
parol proof: that such evidence tends to contradict the note and the policy. But it is competent to show by parol that because

Hopkins v. The Hawkeye Insurance Company.

of the fraud of a party to an instrument it does not express the real agreement.

IV. The court instructed the jury as follows: "If the plaintiff is entitled to recover, the cash value of the property destroyed, at the time of the fire, is to be estimated and you will estimate the value of each class separately. The sum of three-fourths of these valuations will be the plaintiff's damages." The giving of this instruction is assigned as error. The policy sued upon, contains the following provisions: "In case any of the property covered by this policy shall have any liens or incumbrances thereon, either by mortgage or otherwise, the company will not insure or pay, in any event, to exceed two-thirds of the amount of the interest of the assured in such property and such interest is declared to be the difference between the actual cash value of such property, and the aggregate amount of such liens and incumbrances, principal and interest." The application introduced by the defendant, shows that at the time the application was made there was a mortgage of four hundred dollars upon the property. The appellee insists, however, that this defense is not available to the appellant, because the only defense relied upon in the answer is that the plaintiff failed to pay the premium note at maturity and before the loss. But the policy upon which the plaintiff sued contained a provision that the application shall be deemed and taken as a part of the policy. So that the very paper upon which the plaintiff seeks to recover, has incorporated into it, by reference to the application, a statement that the property is incumbered by mortgage to the extent of four hundred dollars, a fact which the policy declares shall limit the recovery to two-thirds of the amount of the interest of the assured in the property after deducting the amount of the incumbrances. Whatever the defense, the plaintiff cannot recover more than, by his own showing, he is entitled to. The jury found specially that three-fourths the value of the dwelling house was \$600, and they al-

 Tracy v. Newton.

lowed the plaintiff that sum for the house. This would make the entire value of the dwelling house \$800. The amount to be allowed the plaintiff for the house should have been determined by deducting the amount of the incumbrance, \$400, from the full value of the house, and taking two-thirds of the remainder, which would be \$266.66 $\frac{2}{3}$, or \$333 33 $\frac{1}{3}$ less than the jury allowed. On this sum of \$333.33 $\frac{1}{3}$ the jury allowed interest for nine months and ten days at six per cent, so that the plaintiff recovered \$348.20 more than he was entitled to. If the plaintiff will, within thirty days of the filing of this opinion, remit \$348.20 of the judgment in the court below, that judgment will be affirmed to the extent of \$810.07. If the plaintiff refuse or neglect to remit as above indicated, the judgment will be

REVERSED.

TRACY V. NEWTON ET AL.

57	210
111	659
57	210
117	686

- Adverse Possession: CLAIM OF TITLE.** Where parties agreed upon and fixed a boundary line between their premises, which by mistake was two rods north of the true line, and plaintiff took possession, as owner, up to such agreed line, and held continuous possession thereof under a claim of title, for more than twenty years, he acquired a valid title to said strip by adverse possession.

Appeal from Guthrie Circuit Court

WEDNESDAY, DECEMBER 7.

ACTION to quiet the title to a piece of real estate, two rods wide and eighty long, in the east half of the south-west quarter of section six, in township, seventy-nine, north of range thirty-one west. The plaintiff's claim is based on his actual and adverse possession for a period of twenty years under a claim of title. The defendants claim under a conveyance made by the plaintiff to E. B. Newton. Judgment for the plaintiff and defendants appeal.

C. Haden, for appellants.

E. W. Weeks and *Lyman Porter*, for appellee.

SEEVERS, J.—We understand the facts to be that in 1853 or 1854 the plaintiff purchased of the general government the southwest quarter of section six, in township seventy-nine, north of range twenty-one west, and a patent was afterward issued to him therefor. At the time of the purchase it was agreed between the plaintiff and E. B. Newton a town should be laid out on a part of the land, and such portion was to be conveyed to Newton. "Such portion was selected and the south line of the town was to be the plaintiff's north line and such line was supposed to commence at a point forty-four rods north of the southeast corner of said southwest quarter.

The plaintiff in 1855 conveyed to Newton a parcel of land, commencing at the place aforesaid and running thence north 1. ADVERSE possession : claim of title. eighty rods, thence west eighty rods, thence south eighty rods, and thence east the same distance to the place of beginning. The place of commencement was not accurately ascertained, that is, from the corner aforesaid. The distance was "stepped" and it was supposed by the parties to be forty-four rods. It has now been ascertained to be forty-six rods. The land to be conveyed, however, was accurately designated, certain natural mounds aiding the parties in determining the south line of the proposed town. When the plaintiff made the conveyance he supposed, there was left in the southeast quarter of the southwest quarter only twenty-two acres of land, and when he took possession in 1855 he supposed there were that number of acres only and he has paid taxes thereon. But he in fact took possession up to the south line of the town and there are twenty-three instead of twenty-two acres in his possession. Such possession was taken under a claim of title and the same has been continuous and adverse. Notwithstanding such is the case the appellants

Tracy v. Newton.

claim he cannot recover and *Jones v. Hockman*, 12 Iowa, 101, and *Grube v. Wells*, 34 Id., 148, are cited in support of such claim.

In the former case the defendant was a settler on what he claimed to be half-breed lands. Neither he nor those under whom he claimed entered into possession under a claim of title. The latter case is distinguishable. The defendant was the owner of lot one in Wood's subdivision in the city of Burlington, and entered into possession thereof. In so doing he set his fence about fifteen feet over on the adjoining lot which was unoccupied. It was found he only intended to take possession of lot one. When he in fact took possession of a portion of the adjoining lot he did not do so under a claim of right or title but intended and believed he was only taking possession of lot one.

In the present case the plaintiff and Newton agreed upon a certain line as being the true division line between the premises conveyed to the latter and the land belonging to the plaintiff. The plaintiff took possession up to such line under a claim that he owned all the land in the quarter aforesaid south of such line. It is not essential such possession should have been taken under color of title. A claim of title it has been held is sufficient. *Hamilton v. Wright*, 30 Iowa, 480.

More than twenty years before the commencement of this action, the plaintiff and Newton agreed upon the dividing line and the former took possession accordingly. He did so in reliance on the agreement and under a claim of title. Ever since that time his possession has been continuous and adverse.

Now, it has been held "when lands of adjacent owners are divided by a partition fence not on the true line, and one of such owners claims and cultivates up to the fence as the true line (with the knowledge and consent of the other), though it is in fact beyond it and on the land of his neighbor, for a

Roby v. Hall.

period of ten years, his possession will be held to be adverse under a claim of right." *Brown v. Bridges*, 31 Iowa, 138.

In *Hiatt v. Kirkpatrick*, 48 Iowa, 78, there was a division line upon which the former owner had agreed and occupied accordingly. It was held the possession so taken and held was protected by the statute of limitations. See, also, *Meyer v. Weigman*, 45 Iowa, 579. The case at bar comes within the rule established in the cases last cited. The fact that plaintiff supposed he only owned twenty-two acres south of the line agreed upon is not deemed material, as he took possession up to such line and that fact must govern instead of the former. Having noticed the points insisted upon by appellant the result is the judgment must be

AFFIRMED.

ROBY V. HALL ET AL.

1. **Practice in the Supreme Court.** The appellant not having shown by an amended abstract, that the certificate to the evidence and the bill of exceptions, were made and filed in proper time, which facts were denied by the additional abstract of appellees, the cause will not be tried *de novo* or upon error.

Appeal from Story District Court.

WEDNESDAY, DECEMBER 7.

THIS is an action in equity, the object of which is to redeem certain lands from tax sales, it being alleged that the plaintiff who was the owner of the land was a minor when the sales were made. There was a trial by the court upon written evidence, and a decree was entered fixing the amount which the plaintiff should pay in redemption. Defendants appeal.

Roby v. Hall.

J. S. Frazier, for appellants.

N. A. Rainbolt and Phillips, Goode & Phillips, for appellee.

ROTHROCK, J.—The questions presented by appellant arise upon certain matters of fact, and which can only be determined by an examination of the evidence. Counsel ^{1. PRACTICE} _{in the supreme court.} for appellee insist, in an abstract filed by them, and in argument and by motion, that the cause can neither be tried *de novo* nor upon error, because there is no certificate of the trial judge to the evidence offered and introduced upon trial, and no bill of exceptions nor assignment of errors.

The point seems to be well taken. It is true the abstract of appellant recites that it is an abstract of all the evidence offered and used on the trial. Ordinarily this would be sufficient if not denied. But the appellees by an additional abstract deny such recital and insist that no certificate of the trial judge to the evidence was ever made and signed, and deny that the evidence was presented by a bill of exceptions. In this state of the record it was incumbent on the appellant to show by an amended abstract that such certificate or bill of exceptions was made and filed in proper time.

The decree of the District Court must be

AFFIRMED.

Truesdell v. Green.

TRUESDELL V. GREEN ET AL.

57	215
88	29

1. **Railroads: TAX IN AID OF.** A tax in aid of a railroad, procured to be voted by representations that it would only be enforced as against non-resident tax payers, will not be sustained.
2. **Tax Titles: VOID: BONA FIDE PURCHASER.** Where the treasurer, after the adjournment of a tax sale, executed certificates, without a sale, to a pretended purchaser, pursuant to a prior private agreement with him, the tax titles and deeds based upon such certificates were absolutely void, and a purchaser thereunder, by warranty deed, for value and without notice, would not be protected as an innocent purchaser.
3. **—: ESTOPPEL.** Where the tax payer did not know prior to the construction of the railroad, that the work was being done on the faith of the tax voted in its aid, he is not estopped from denying the validity of the tax.

Appeal from Cerro Gordo Circuit Court.

WEDNESDAY, DECEMBER 7.

THE plaintiff brings this action to quiet his title to certain land in the petition described. The plaintiff claims that he is the absolute owner of the real estate in question, in virtue of a sale thereof under execution as the property of one Westbrook, and a sheriff's deed executed pursuant to said sale.

The defendants for answer in substance allege that the property in controversy was, on the 2nd day of October, 1871, sold at tax sale to one James Thompson, for delinquent railroad taxes of 1870; that the certificate of purchase was assigned to A. N. Hobson, to whom a treasurer's deed was executed May 27, 1876; that on January 11, 1877, Hobson conveyed said premises by warranty deed to the defendant Thomas L. Green, and that on the 27th of August, 1877, Thomas L. Green conveyed said land by warranty deed to the defendant George Mantz. The plaintiff, for reply, amongst other things, alleged that the railroad tax was levied by reason of an election at which the vote in favor of levying the tax was fraudulently procured, and that the premises were not sold at a public tax

Truesdell v. Green.

sale as provided by law. The court decreed in favor of the plaintiff. The defendants appeal.

Ainsworth & Hobson, for appellant

Richard Wilber, for appellees.

DAY, J.—I. The tax in question was voted in Geneseo township, Cerro Gordo county, in aid of the Central Railroad of Iowa. Prior to the time the tax was voted one
1. RAILROADS:
tax in aid of. Judge Woodbury, of Marshalltown, a director of said railroad company represented to a tax payer of said township that the company would want a five per cent tax in aid of the road, that they should not want it of the residents who had paid the tax in 1868, but wanted to get it of the non-residents who, by the adverse decision of the Supreme Court in 1869, had evaded payment. This representation was communicated to the other voters, and the reasons urged for voting for the tax were that the residents who paid the tax of 1868, would receive immunity from the tax they were then voting. Upon the day of the election one H. W. McNiel appeared as the representative of the company and said the object was to get the residents to vote for a tax, not that they would have it to pay, but the company wanted to get it out of the speculators. It was a general talk among the voters that the railroad company wanted to get the tax from the non-residents. These representations made the voters willing to vote the tax. Nearly all of the certificates of sale issued for the delinquent taxes of residents, were afterward, without consideration, returned to them, pursuant to these representations.

It seems to us too clear for question that a tax procured in this way cannot be sustained. It will not do to allow a tax to be voted upon the property of a township by offering and securing to residents, who alone can vote, immunity from the burden imposed. The only protection afforded to property from ruinous impositions arises from the fact that such bur-

Truesdell v. Green.

dens will not likely be imposed by those who must share in bearing them. Let the principle once be recognized that the parties who vote taxes may be exonerated from paying them, and there is no power which can save the property of non-residents from confiscation. It may be that the promise itself was illegal, and could not be enforced. But even if this should be conceded it could not render the tax valid as to a non-resident who could not participate in the election.

II. Before the sale for delinquent railroad taxes occurred, one James Thompson, representing the railroad company, told the treasurer that if nobody offered to bid in the lands and pay the money, he would pay the fees for making the certificates, and would see

2. TAX TI-
TIES void:
bona-fide
purchaser.

that he was furnished a proper receipt from the railroad company for the amount of the tax, but that he did not want the certificates if any one else would take them and pay the money. The treasurer waited until after the sale was completed to see if somebody would not buy the lands and pay the money. Nobody bid upon the lands, and the treasurer made out certificates to Thompson for all the lands, in pursuance of his offer before the sale. The amount of taxes due on each piece was not stated, nor were the lands publicly announced for sale. Thompson was not present at the sales, nor any one representing him. There was here in fact no sale of the lands whatever. After the sale was over, no one having bid upon the lands, the treasurer simply made out certificates of purchase to Thompson for all the lands, pursuant to an offer made by Thompson before the sale began, of which no one knew anything except Thompson and the treasurer. Thompson paid no money, but simply took the lands on behalf of the railroad company, and executed receipts for the tax. Such a proceeding cannot be upheld without sanctioning the grossest violations of the law. See *Butler v. Delano*, 42 Iowa, 350; *Thompson v. Ware*, 43 Iowa, 455.

III. The defendant Mantz claims that he is entitled to pro-

Truesdell v. Green.

tection as a *bona-fide* purchaser, under a warranty deed, without notice. He testifies that he knew nothing of the manner in which the tax was voted, or the sale conducted, or Green obtained his title. The defendant relies upon *Van Shaick v. Robbins*, 36 Iowa, 201; *Sib'ey v. Bullis*, 40 Id., 429; *Ellis v. Peck*, 45 Id., 112; *Huston v. Markley*, 49 Id., 162, and *Martin v. Ragsdale*, Id., 589.

Van Shaick v. Robbins, *Sibley v. Bullis*, and *Huston v. Markley*, are all cases where there was a public sale in fact, but a fraudulent combination was entered into to prevent competition. It was held that the sales were voidable and not void, and that the title should be protected in the hands of an innocent purchaser for value. In *Ellis v. Peck*, it was held that the fact that the land was bid off at the tax sale by the deputy treasurer, rendered the title voidable but not void, and that an innocent purchaser for value would be protected. In *Martin v. Ragsdale*, 49 Iowa, 589, for the purposes of the case it is conceded that the sale was not publicly made, and the defendant is protected as a *bona fide* purchaser from the holder of the treasurer's deed, under the doctrine of *Van Shaick v. Robbins*, and *Sibley v. Bullis*, *supra*. The facts upon which the decision is based are not stated, and in order to determine the value of the case as a precedent, it is necessary to consider the facts attending the sale then under consideration. The record upon which that case was determined shows that the sale was conducted in the following manner: All the lands on which the tax was delinquent for 1867 were advertised for sale on the first Monday of October, 1868. On that day the treasurer declared all such lands as offered for sale to the highest bidder, that is to the person who would pay the tax on a piece of land for the least amount thereof. The sale was adjourned from the first Monday of October to the first Monday of November, and all lands not sold when first offered were offered at the next adjourned sale, and so on, adjourning from month to month. All lands unsold for taxes

Truesdell v. Green.

of 1867 on March 1, 1869, were offered at that adjourned sale, at which time the lands in controversy were sold to one Brown, and a certificate of purchase was issued to him therefor. The treasurer raised the window, stuck his head out and cried out that the sale was open for the sale of all lands delinquent for taxes of 1867 and previous years. The manner of selling was simply to declare all lands and lots in Union county on which the tax was delinquent for 1867 or previous years, now offered for sale to the highest bidder, the highest bidder being the person who would pay the tax, interest and cost for the least amount of the land. The treasurer did not go over by description and offer each piece to the highest bidder, but the party wishing to buy selected from the list any piece remaining unsold, and, if no other bid was offered, it was struck off to him at the amount of the tax, interest and cost. In this way the lands in controversy in that case were sold to Brown. Now it appears that what was done in *Martin v. Ragsdale* differs materially from the proceedings in this case. The essential points of difference are, that in *Martin v. Ragsdale* what was done was done openly and publicly, and during the time fixed for the prosecution of the sale, whereas, what was done in the case at bar was done secretly and privately between the treasurer and Thompson, and after the time for the sale had passed, and the sale had been adjourned.

The case of *Martin v. Ragsdale* falls nearly under the facts, and fully under the principle of *Leavitt v. Watson*, 37 Iowa, 93, whilst the case at bar comes under the principle of *Butler v. Delano*, 42 Iowa, 350. Now, whilst *Martin v. Ragsdale*, was correctly decided under the facts involved, it is based solely upon *Van Shaick v. Robbins* and *Sibley v. Bullis*. We do not feel like extending the principle of those cases to a case where, as in the case at bar, no sale at all was made, but after the adjournment of the sale the lands were simply marked sold, pursuant to a private arrangement between the pretended purchaser and the treasurer. If the treasurer can, by merely

 Truesdell v. Green.

issuing a certificate of purchase, without any offering of the lands for sale, place it in the power of the holder of the certificate to procure a deed and convey a good title to an innocent purchaser for value, the result would be an entire nullification of the provision of the statute respecting sales, and an end to all the protection it is destined to afford. It is claimed that the records showed the execution of a treasurer's deed valid upon its face, and that a purchaser from the grantee in such a deed ought to be protected. But if a deed were forged, the records would show an apparently valid conveyance to the grantee. Yet no one would claim that the real owner could be divested of his title through a conveyance to an innocent purchaser by the holder of a recorded, forged deed. Even when a deed was deposited as an escrow, and its possession was fraudulently obtained, it was held that it passed no title, and that an innocent purchaser from the grantee would not be protected. See *Everts v. Agnes*, 6 Wis., 453; see also *Fisher v. Beckwith*, 30 Wis., 55.

A purchaser always runs some risk, against which he must protect himself by exacting covenants of warranty. The defendant cannot, we think, be protected as an innocent purchaser.

IV. Defendant claims that plaintiff is estopped to insist upon the invalidity of the tax. It is claimed that objection should have been made *in limine*, before the railroad completed its road. The defendant cites and relies upon *Patterson v. Baumer*, 43 Iowa, 477, and *Butler v. Board of Supervisors*, 46 Id., 326. In both cases the parties seeking relief knew that expenditures were being made on the faith of the tax. No such fact is shown in this case. It does not appear that the owner of the lands in question at the time of the vote of the tax and pretended sale, has ever been a resident of Iowa, or that he knew anything about the construction of the road in question. The doctrine of estoppel is not applicable.

AFFIRMED.

Bennett v. Carey.

BENNETT V. CAREY.

87	221
90	157
57	221
125	676

1. **VENUE: CHANGE OF: AUTHORITY OF THE COURT.** A court has no authority upon its own motion, to change the venue of a case, whether for the trial of a part or all the issues involved therein; and the fact that an application for a change of venue had been filed and sustained in another case, involving the same issues, is no ground for such change.
2. ———: ———: **WAIVER OF.** An erroneous order for a change of venue is not waived by the party going to trial without objection in the court to which the case is sent.

Appeal from Page District Court.

WEDNESDAY, DECEMBER 7.

THIS is a proceeding by petition under Code, sections 3155-3162, to obtain a new trial in an action at law in which the defendant herein was plaintiff. The judgment was vacated and it was found that the defendant therein had a good and complete defense to the action, and final judgment was entered accordingly. Defendant appeals.

Hepburn & Thummel and *James McCabe*, for appellant.

W. W. Morseman and *W. P. Ferguson*, for appellee.

BECK, J.—I. On the 17th day of June, 1878, judgment by default was rendered against Bennett, the plaintiff herein, in the Circuit Court, in an action in which Carey, the defendant herein, was plaintiff and Bennett and others were defendants. On the 28th day of the same month and after the term Bennett filed his petition in this case praying that the judgment be set aside and that his defense to the action be tried and determined. The allegations of the petition we need not recite.

It appears that a trial was had in the Circuit Court to a jury and by their special findings it was determined that the judgment was obtained by misconduct of the prevailing party and through irregularities in the proceedings of the court.

 Bennett v. Carey.

Defendant Carey filed a motion for a new trial based upon various grounds. Thereupon the Circuit Court upon its own motion, entered an order changing the venue of the case to the District Court. This order recites the grounds upon which it is based and is in the following language:

“ N. BENNETT
 v.
 “ B. W. CAREY. } No. 1609.

“ The court finding that this case is a part of the case of No. 1352, of this court, and may involve the same issues on the trial of the same, and, as an affidavit in said last named cause was filed for change of venue, upon the ground of the prejudice of the judge of this court to the plaintiff in that cause, and defendant in this, and the motion in said case, No. 1352, having been sustained, this cause is transferred to the District Court of Page county, to which order and ruling of the court defendant excepts.”

The cause seems to have been sent upon this order to the District Court where the motion for a new trial was overruled. And thereupon certain amended pleadings were filed presenting issues as to the validity of the defenses pleaded in the original action. These issues were submitted to another jury and special findings were had for the defendant to the effect that there did exist lawful defenses to said action and thereupon a judgment was entered setting aside, vacating and adjudging to be null and void the first judgment.

II. The defendant now insists that the Circuit Court erred in changing the venue of the case upon its own motion. The forum for the trial of the case as prescribed by law was the Circuit Court. The defendant had a right to a trial in that court and could not have been lawfully deprived of that right in the absence of a statute authorizing the change of venue upon the court's own motion. The issues involved in one branch of the case had been submitted to a jury and a verdict rendered for the plaintiff. The

1. VENUE:
 change of:
 authority of
 the court.

other issues were for determination and the law provides that they also should be tried in the Circuit Court. There is no statute authorizing a court upon its own motion to change the venue of a case, whether for the trial of a part or all the issues involved therein. The whole case must be tried in the forum prescribed by law, and to a trial there the parties, as we have said, have a right of which they cannot be deprived except in the manner prescribed by law, namely, by a petition or application of one of the parties upon the grounds recognized by the statute. It will be readily seen that if the courts upon their own motion may change the venue of causes, parties may be deprived of the right of trial in the county and before the forum prescribed by law.

We have held that the venue of a case cannot be changed after a verdict and while a motion for a new trial is pending. *Perkins v. Jones & League*, 55 Iowa, 211. Under this rule the Circuit Court erred in changing the venue before the motion for a new trial was disposed of.

III. The ground for the change of venue recited in the order of the Circuit Court above quoted did not authorize the action of the court in sending the cause away. The fact that the defendant had in another case made application for a change of venue therein is no ground for changing the venue in this case. Each case must be determined upon the proper proceedings therein and the Circuit Court cannot look to the record of another case for guidance in making preliminary and interlocutory orders.

IV. It is insisted that as defendant did not make objection to a trial in the District Court and made no motion in that court bringing in question the change of venue, ^{waiver of.} he is precluded now from raising objections to the proceedings and judgment in the District Court. But we have held that objection to an erroneous order for a change of venue is not waived by a party assenting to a trial in the court to

Bennett v. Carey.

which the cause was sent. *Ferguson v. Davis County*, 51 Iowa, 220.

We concluded that the venue of the cause was changed without authority of law, and that the judgment for this error must be reversed.

V. Numerous errors in addition to the objection just considered are assigned upon the record. We are not authorized to consider them. The defendant was entitled to the judgment of the Circuit Court upon his motion for a new trial and if that had been overruled, to a trial in the same court upon the remaining issues of the case. These rights were defeated by the change of venue and the cause was unlawfully tried in the District Court. The defendant must be restored to the condition in which he can have these rights secured. This can only be done by sending the cause back to the Circuit Court for decision upon the motion, and for such further proceedings thereafter as the law requires. All proceedings in the cause following and including the change of venue were without authority of law. We cannot be required to review these unauthorized proceedings. And as the motion for a new trial must be passed upon by the Circuit Court the decisions and proceedings brought in question thereby, cannot be reviewed until that motion is disposed of by the decision of the Circuit Court. It is therefore plain that we are authorized to review the case no further than to pass upon the order making the change of venue. We therefore consider no other question in the case. The judgment of the court below is reversed and the cause is remanded for proceedings in harmony with this opinion.

REVERSED.

THE CITY OF CENTERVILLE V. MILLER.

1. **Municipal Corporations: ORDINANCE.** A city has power under the general incorporation law of the State to pass an ordinance for the punishment by fine, of the keeper of a disorderly house. Following *The City of Centerville v. Miller, ante, p. 36.*

Appeal from Appanoose District Court.

WEDNESDAY, DECEMBER 7.

THE defendant was convicted in the Mayor's court of the City of Centerville with having violated ordinance 113 of that city. The ordinance provides among other things that any person who obtains a license or permit to sell ale, wine and beer within the corporate limits of the city, and who shall be charged and convicted of keeping a disorderly house where ale, wine and beer are sold, shall be deemed guilty of a misdemeanor, and be fined in a sum not less than twenty dollars nor more than one hundred dollars. The information charged that the defendant obtained a license or permit to sell ale, wine and beer, within the limits of the city of Centerville and while exercising the rights thereunder did keep a disorderly house wherein he permitted intoxicated persons to congregate and quarrel and fight, and make use of loud, profane and vulgar language, contrary to the provision of the ordinance, 113.

The defendant pleaded not guilty and on trial was found guilty and appealed to the District Court. In the District Court he withdrew the plea of not guilty, and demurred to the information on the ground that the court has no jurisdiction of the offense charged.

The court overruled the demurrer and the defendant electing to stand upon his demurrer, judgment was rendered that the defendant pay a fine of fifty dollars, and in default of payment that he stand committed for fifteen days

 Otto v. Schlapkahl.

at hard labor in the county jail. He now appeals to this court.

Geo. D Porter, for appellant.

Vermillion & Vermillion, for appellee.

ADAMS, CH. J.—The question as to whether a city or incorporated town, under the general incorporation law of Iowa, 1. MUNICIPAL corporations: ordinance. can punish by fine the keeper of a disorderly house was ruled upon in the case of *The City of Centerville v Miller*, ante, page 56. It was held that the city or town had such power. The ordinance in question therefore was valid and the court had jurisdiction of the alleged offense. We think that the demurrer was properly overruled.

AFFIRMED.

57 226
100 696
57 226
121 443

OTTO ET AL. V. SCHLAPKAHL ET AL.

1. **TRUST: STEP-FATHER.** It is not incumbent upon a step-father to extinguish a mortgage upon the real estate of his minor step-children, and thus preserve their inheritance; and he has the same right to acquire title to such real estate as a stranger has.
2. ———: **STATUTE OF LIMITATIONS.** The statute of limitations will run in favor of a trustee of a resulting or constructive trust, from the time he disowns the trust and claims title in his own right.

Appeal from Scott Circuit Court.

THURSDAY, DECEMBER 8.

THIS is an action in equity to recover forty acres of land, and to redeem from a mortgage by the payment of the amount the defendant Schlapkahl, advanced in payment thereof. There was a demurrer to the petition which was sustained. Plaintiff appeals.

Otto v. Schlapkahl.

Hirschel & Preston, for appellant.

Green & Peters, for appellees.

ROTHROCK, J.--The plaintiff's claim to the land is based upon the following facts as shown by the allegations of the petition and by an abstract of title which was attached to the petition by the consent of the parties.

August Peterson was the owner in fee of the land in controversy and died in 1856 or 1857, leaving a will by which he devised said land, and certain personal property of more than \$500 in value to his wife for life, and remainder to plaintiffs, who were his children. The will was admitted to probate in 1857. The land consisted of a tract of forty acres, and constituted the homestead of Peterson and his family. Shortly after his death his widow married the defendant Schlapkahl, who took up his abode on the land with the widow, and took possession of all the personal property, and cultivated, managed, and controlled the land and used the income and receipts therefrom, and the personal property, and accounted to no one, and still retains the same.

At the time of Peterson's death there was a mortgage or deed of trust upon the land executed by himself and his wife upon which something over \$500 was due. The trust deed remained unpaid and in 1860 the land was sold thereunder to one Dow for \$500. Dow immediately conveyed to one Klindt for an expressed consideration of \$600. Before the sale on the trust deed the widow of Peterson and her husband, the defendant Schlapkahl, conveyed the life estate of the widow to said Klindt. Klindt leased the property to the defendant, November 1, 1860, with the privilege of purchasing the same and on the 2nd day of April, 1867, Klindt conveyed the land and an additional forty acres to the defendant for an expressed consideration of \$4,000, taking a mortgage back for \$1,875, which mortgage has been replaced by one in favor of the German Sav-

 Otto v. Schlapkahl.

ings Bank for \$1,300. The wife of Schlapkahl died in 1879, and this suit was commenced in January, 1881.

It is averred in the petition that the defendant took possession of said land and still holds the same as the trustee of the plaintiffs, and that disregarding his duty to the plaintiffs who were all minors at the time, he permitted the land to be sold by the trustee under the deed of trust to satisfy the sum of \$537, although he well knew the same was worth \$2,500, and that he was either able to pay said incumbrance or secure an extension of time thereon. That instead of thus protecting the interests of the plaintiffs he conspired and colluded with Klindt with the purpose of defrauding the plaintiffs by allowing the land to be sold. That Klindt paid nothing therefor, but transferred the same to defendant, who, by making new loans, paid the purchase price which the property brought at the trust deed sale.

The substance of the prayer of the petition is, that plaintiffs be decreed to be the owners of the land; that an account be taken of the rents and profits thereof, and that defendant be credited with the amount secured by said trust deed, and that plaintiffs be allowed to redeem therefrom.

The second ground of the demurrer and which the circuit court sustained was based upon the statute of limitations.

It is conceded that the defendant has been in the actual open and notorious possession of the property in controversy for more than twenty years. It is insisted by counsel for appellant that the defendant took possession of the land as the husband of their mother, and that as such he occupied the relation of a parent to the plaintiffs, and his possession was in the nature of a trust, and that as such trustee he acquired no adverse right to the land, but still holds the same in trust for the plaintiffs.

It is true the husband of the mother of minor children, who are members of his family, stands in *loco parentis* to the minors and under ordinary circumstances can make no claim for

 Otto v. Schlapkahl.

their support and maintenance. *Bradford v. Bodfish*, 39 Iowa, 681; *Gerdes v. Weiser*, 54 Id., 591. But we are asked to go much further in the case at bar, and hold that it was incumbent on the step-father to extinguish a mortgage upon the real estate of the step-children, and thus preserve their inheritance, or in other words, to require the step-father to pay the debt of his wife's deceased husband. We do not think any such liability is incurred, whatever property may come into the hands of the step-father by virtue of his marriage.

In this case the land was incumbered by the trust deed. It was sold thereunder to Dow in the year 1860. Before this, however, the plaintiffs' mother parted with her life estate by a conveyance to Klindt. The sale to Dow is not in any manner questioned. The conveyance to him was therefore a complete extinguishment of the plaintiffs' title to the land. Dow conveyed to Klindt and he to the defendant. The defendant has been in possession under this conveyance since the year 1867. If he was under no obligation to pay the debt secured by the trust deed he had the same right to acquire title to the land under it that any other stranger to the title had, and his possession being adverse under claim of title, an action to recover the land was barred in ten years.

But plaintiffs claim that no right of action accrued to them until the termination of the life estate which occurred at the death of their mother in the year 1879. But the ready answer to this position is that the remainder in fee of the plaintiffs' was divested by the conveyance to Dow under the trust deed. If they desired to redeem from that sale or question its validity in any way the courts were open to them for that purpose from the date of the sale and conveyance to Dow until barred by the statute. And if the defendant connived or colluded with Klindt to defraud them in any way there was no obstacle in the way of their assertion of their rights at once. That the defendant claimed the land adversely is apparent from all the averments of the petition.

2. — : stat-
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tions.

Chase v. Welty.

He joined his wife in a conveyance of her life estate and took the title under the trust deed. If it were to be conceded that his relation to the plaintiffs was that of a trustee, he ignored the trust and set up title in himself joined with possession as early at least as the year 1867. His acts were open, notorious, and matter of record. That the statute of limitations will run in favor of a trustee of a resulting or constructive trust from the time he disowns the obligation of the trust and sets up a claim in his own right to the trust property, is well settled *Gebhard v. Sattler*, 40 Iowa, 152, and authorities there cited.

AFFIRMED.

CHASE V. WELTY.

1. **Surety: LIABILITY OF: STAY BOND.** Where the surety, against whom judgment is rendered, fails to object to a stay of execution taken by the principal, he will be presumed to have consented to such stay; and in that case, the surety on the stay bond, as between him and such original surety, will not be charged with primary liability to pay the judgment.
2. ———: **WAIVER OF REDEMPTION.** Where the original surety makes no objection to a stay of execution on the judgment, he is presumably a party thereto, and has thereby waived his right to redeem his lands subsequently sold on execution to satisfy the judgment.

Appeal from Page Circuit Court

THURSDAY, DECEMBER 8.

THIS action was brought to set aside an execution sale of land, and a deed made in pursuance thereof. The plaintiff averred in his petition in substance that the sale was wrongfully and irregularly made, and should be set aside for that reason.

He also averred in his petition that he had offered to redeem, and he prayed that, in case the sale is held valid, he be allowed to redeem therefrom.

The defendant denied the allegations of the petition.

Chase v. Welty.

After the commencement of the action the plaintiff, Charles Chase, died intestate, and his heirs, Geo. H. Chase, C. M. Chase and Celia Clark, were substituted as plaintiffs. The court rendered a decree allowing the plaintiffs to redeem by paying the amount necessary for that purpose within thirty days from the date of the decree. The defendant appeals.

Hepburn & Thummell and *James McCabe*, for appellant.

W. W. Morseman and *C. S. Keenan*, for appellees.

ADAMS, CH. J.—I. The first question presented is as to whether the sale ought to be set aside. The plaintiffs contend that it ought, because the debt upon which the land was sold was the defendant's debt, and that what he paid ostensibly in the purchase of the land should be treated as a payment of the debt.

For a correct understanding of this point it is necessary for us to give a brief history of the transactions which resulted in the sale. The judgment under which the sale was made was rendered against one Hill who was the principal debtor and against Geo. H. Chase, who was surety for Hill. The land sold belonged at the time the judgment was rendered to Geo. H. Chase. The judgment became a lien upon the land. Afterwards it was sold and conveyed subject to the lien by Geo. H. Chase to his father, Charles Chase, who brought this action. The judgment debtor, Hill, stayed execution upon the judgment by filing a stay bond with the defendant, Welty, as surety. After the expiration of the stay, execution was issued and levied upon the land in question, and the land was sold under execution to the defendant Welty, who bid off the same for the amount of the debt. He demanded thereupon a sheriff's deed, claiming that as the judgment had been stayed there was no right of redemption of the land; and a sheriff's deed was executed to him in accordance with his demand.

The plaintiffs contend that Welty, by signing the stay bond,

Chase v. Welty.

not only became liable to pay the debt, but as between him and Geo. H. Chase, who was merely surety for the debt, it was Welty's duty to pay it and protect Chase. It is upon this ground that the plaintiffs claim that the amount paid by Welty should be treated in this action as having been paid directly in extinguishment of the debt and not in the purchase of the land. In support of their claim they cite Brandt on Suretyship, section 22, in which the author says: "A surety who becomes bound for a debt in the course of legal proceedings against the principal for the collection of the same is not co-surety with the original surety for the debt, nor entitled to contribution from him." Welty became bound for Hill's debt in the course of legal proceedings against him for the collection of the same. Hence it is said that Welty did not become a co-surety with Chase, and it is argued that if he did not become co-surety, then as between them he became primary surety, and being such, if Chase had paid the debt it would have been his right to look to Welty.

In *Chaffin v. Campbell*, 4 Sneed. (Tenn.), 184, it was held in substance that where a judgment is rendered against a principal and surety, and the principal alone appeals, and the judgment is affirmed, and the surety upon the appeal bond pays the debt, he cannot look to the original surety.

Decisions in which a similar principle is held can be found elsewhere. When an appeal is taken by a principal alone and the judgment is superseded, the liability of the original surety is prolonged and it may be without his consent. His right to pay the debt and look immediately to the principal for reimbursement is suspended. In such case it seems clear that the surety upon the appeal bond, whose action may operate to the injury of the original surety, should, as between him and the original surety, be charged with a primary liability for the debt. By a provision of the statute the same rule is made applicable where execution upon a judgment is stayed, provided it is made to appear in the proper way that the stay was taken

Chase v. Welty.

against the original surety's consent. It is the right of the original surety, when judgment is rendered against him, to object to any stay of execution. If he does so, no stay can be taken unless the surety for the stay will undertake specifically to pay the judgment in case the amount thereof cannot be levied of the principal. Code, § 3068.

Now this section is significant as bearing upon Welty's rights in this case. The original surety, Chase, did not object to a stay being taken, and Welty did not specifically undertake to pay the judgment under the provision of the statute above cited, yet we are asked to hold that his liability is precisely the same as it would have been if he had so undertaken. It is evident that we cannot so hold and give any force to the provision. The true idea doubtless is that where the original surety does not exercise his statutory right to object to a stay being taken, it is to be presumed that it is taken with his consent and for his supposed benefit as well as for the benefit of the principal, and the argument that his liability has been prolonged has no weight. In our opinion then the plaintiff's position that, as between Welty as surety for the stay, and Chase as original surety, there was a primary liability resting upon Welty, is not well taken.

II. But it is said that Chase had a statutory right of redemption, and offered to redeem within the time allowed. It

_____ : must, we think, be conceded he had such right unless he lost it by reason of the stay being taken.

Welty claims he did.

Code, section 3102, provides that in no action where the defendant has stayed execution shall he be entitled to redeem. That execution was stayed as to Chase is not denied, but it is said that the stay was taken by his principal and not by him.

Neither signed the stay bond. That was signed by Welty alone. The only ground upon which it can be said that Chase's principal alone took the stay is that he alone was active in procuring the bond to be signed by Welty, and in filing the same.

Chase v. Welty.

Whether the plaintiffs would admit that Chase would have lost his right to redeem by any activity, however small in procuring or filing the stay bond, they do not say. But we cannot think that the question as to the right to redeem real estate should be made to depend upon a fact of such a character. Where there is a right to redeem it is the duty of the sheriff making the sale to execute to the purchaser a certificate of sale, and where there is no right to redeem, to execute to him a deed. But he has no means of determining such a fact as the activity of the execution defendant, whose property is sold, in procuring the stay where there is more than one defendant. So, too, it appears to us that bidders and purchasers at the execution sale have a right to know whether the property is subject to redemption or not. The execution defendant himself whose property is sold might suffer great injury by allowing the period of redemption to expire in reliance, upon showing that he was not active in procuring the stay, if the facts in regard to his activity were doubtful or should be misinterpreted.

If the original surety under the provision of section 3068 above cited, objects at the time judgment is rendered to any stay of execution being taken, and stay is nevertheless taken, there would be much ground for him to contend that he should not be deemed a party to the stay, and that his land if sold should be subject to redemption. But in such case his right would be apparent of record. Upon his objecting to a stay it would be the duty of the court to make an order, and from the order it would be seen that the stay had been objected to.

But where, as in this case, no objection by the original surety to the stay is made, and it is presumably taken with his consent, and for his supposed benefit, we think that the statute contemplates that he is a party to it, and in such case he must be held to have parted with his right to redeem.

The defendant contends that there was never any proper tender or offer to redeem made, and that the plaintiffs for that reason, if no other, cannot be allowed to redeem now.

Dewey v. Lins.

Having reached the conclusion that there was at no time a right of redemption from the sale it is unnecessary to consider whether if there had been one, there was a proper attempt to exercise it within the time allowed.

The abstract presents several questions in addition to those above considered, but they are not urged by the plaintiffs in argument and we infer that they are not relied upon.

REVERSED.

DEWEY V. LINS ET AL.

Township Clerk: STATUTE OF LIMITATIONS. Where the township clerk paid a road order drawn on him by the township trustees, but failed to have the same audited and allowed in his regular settlement with the trustees, the statute of limitations commenced to run thereon from the date of the first settlement, at which the claim should have been presented and paid.

Appeal from Washington District Court.

THURSDAY, DECEMBER 8.

ACTION of mandamus to compel the defendants, who are trustees of Washington township, to pay a claim held by the plaintiff against the township. Judgment was rendered for the defendants for costs. Plaintiff appeals.

Dewey & Templin, for appellant.

H. & W. Schofield, for appellees.

ROTHROCK, J.—The facts of the case are not in dispute, and are as follows:

The plaintiff was township clerk of Washington township, and on the 18th day of October, 1875, he paid a road supervisor's order from the proper funds in his hands for that purpose. In January, 1876, he had a settlement with the trustees, and by reason of said

TOWNSHIP
CLERK: stat-
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tions.

Dewey v. Lins.

warrant being misplaced and forgotten, he was not credited with the amount paid thereon. He had another settlement with the trustees in November, 1876, and the amount of said warrant was not included in that settlement for the same reason. In January, 1877, the plaintiff for the first time discovered said warrant, and the fact that the same had not been settled for by the trustees. In April, 1879, at a regular meeting of said trustees, plaintiff first presented said warrant and demanded payment of the same, which was refused. This action was commenced November 6, 1879. The defendants pleaded the statute of limitations. The amount in controversy being less than \$100, the District Court has certified for our determination the following questions:

"A township clerk having duly paid an order drawn on him by the township trustees, and failing to receive credit for the same at his annual settlement by said order having been mislaid, and afterward duly presenting the same to the said trustees and asking provision for its payment, when does the statute of limitations commence to run in a suit of this character?"

The third subdivision of section 2529, of the Code, limits to three years, all actions against a sheriff or other public officer growing out of a liability incurred by the doing of an act in an official capacity, or by the omission of an official duty. * * * * * When the order was paid by the plaintiff, he had a valid claim against the township, which it was the duty of the trustees to audit and pay. Reimbursement could have been enforced at any time after the order was paid. At the first settlement it was clearly the duty of the trustees to audit and allow the claim. Failing in this, they were then liable to an action for the "omission of an official duty." It was their duty in settling the affairs of the township to see that provision was made for the adjustment and payment of all valid claims, and not leave debts unprovided for, and not audited and allowed. We are clearly of the opin-

Cassady v. Spofford.

tion that the statute commenced to run from the date of the first settlement, at which time the claim should have been allowed and paid. To hold that the limitation commenced to run from the time that the demand was made would operate to indefinitely prolong the operation of the statute by failing to make the demand. That such is not a proper construction of the statutes see *Prescott v. Gonser*, 34 Iowa, 175.

AFFIRMED.

CASSADY V. SPOFFORD ET AL.

1. **Practice in the Supreme Court: ABSTRACT.** Where the abstract fails to show that it contains all of the evidence, this court cannot enter upon an examination of the merits of the case.
2. —: **ASSIGNMENT OF ERRORS: WAIVER OF.** An assignment of errors, not argued, will be regarded as waived. A party not appealing, can urge no objection in this court, to the decree of the court below.

Appeal from Polk Circuit Court.

THURSDAY, DECEMBER 8.

ACTION in chancery to foreclose a contract for the sale of city lots. There was a decree for plaintiff; a part of the defendants appeal.

R. G. Orwig, for appellants.

Williamson & Kavanaugh, and **Phillips, Goode & Phillips**, for appellees.

BECK, J.—I. The pleadings show that the contract, which is the foundation of the action, provides that upon certain payments being made the plaintiff shall execute to defendant Spofford, with whom the contract was made, a bond for the conveyance of the property "in such parcels" as he may desire. Spofford sold the lots or parts of the lots to the other defend-

Cassady v. Spofford.

ants, who in a cross-petition ask that conveyances be made to each for the lot purchased by him. The decree of the court below provides for the payment, within a time fixed, by the defendants who purchased of Spofford, and that the lots of the parties making default in the payment, shall be first sold. Other provisions of the decree need not be recited. One of the defendants does not join in the appeal.

II. The abstract upon which the case is submitted fails to show that it contained all of the evidence. We cannot, therefore, try the cause anew. Counsel for appellants prints in his argument in reply the certificate of the judge trying the case which, it is said, is attached to the evidence transmitted to this court. But this fails to aid appellants as it is not shown that all of the evidence is presented in the abstract. In this condition of the case we cannot enter upon an examination of its merits.

III. Appellants file assignments of errors. One of the errors complained of is based upon the overruling of a demurrer by two of the defendants to the cross-petition of another defendant who does not appeal. But this error is not pressed in the argument of appellants. It must, therefore, be regarded as waived. The other errors assigned all assail the decree of the court below upon grounds which, in effect, deny that it is supported by the testimony. But all the evidence, as we have seen, is not presented in the abstract. If the cause is reviewable upon errors assigned, the appellants, for these reasons are not entitled to such a trial.

IV. The plaintiff complains of the decree. But as he has not appealed he can urge no objection to the decision of the court below.

For the reasons we have stated the decree of the Circuit Court is

AFFIRMED.

 Davis v. Gambert.

DAVIS V. GAMBERT.

Replevin: INTERVENTION: CROSS-REPLEVIN. The owner of personal property, held by an officer under a writ of replevin in another case, to which such owner was not a party, may maintain cross-replevin against the officer for its possession. The remedy by intervention in the first suit is not exclusive.

Appeal from Linn Circuit Court.

THURSDAY, DECEMBER 8.

ACTION in replevin. A demurrer to the petition was sustained and judgment was rendered for defendant. Plaintiff deals.

George W. Wilson, for appellant.

James D. Giffin, for appellee.

BECK, J.—I. The petition alleges that plaintiff is the absolute owner of certain personal property which is wrongfully detained by defendant, who being a sheriff, seized and holds it on a writ of replevin, issued in an action brought by one Daniels against Wilson; that when seized by defendant the property was in the possession of plaintiff, who before had acquired the title thereto, and the possession was neither directly nor indirectly derived from Wilson. It is alleged that the property was not taken by defendant on the order or judgment of a court against the plaintiff nor under an attachment or execution against her or against the property.

The defendant demurred to the petition on the ground that it shows the property was held by defendant upon a writ of replevin, and was therefore in the custody of the law. The demurrer was sustained. This ruling presents the only question in the case.

II. The action which is denominated by the profession re-

Davis v. Gambert.

plevin, is, in this State, wholly provided for by statute, which prescribes in what cases it shall be prosecuted and
 1. REPLEVIN :
 Intervention :
 cross-re-
 plevin.
 the proceedings therein. We can gain no aid in the solution of the question before us by the application of the rules pertaining to the action at common law. We will proceed to consider the statute relating to the action and inquire whether the remedy is denied to the owner of personal property, when it is held by an officer upon a writ of replevin issued in a case wherein the plaintiff is not a party.

Under our statute the action is provided to recover specific personal property, and damages for its detention. The petition must show that the property "was neither taken on the order or judgment of a court against" the plaintiff, "nor under an execution or judgment against him or against the property." But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process." Code, § 3225, par. 4. An officer seizing property on execution is protected from an action to recover the same unless written notice of the ownership be served upon him. Code, § 3055. The statute imposes no other restrictions upon the remedy by replevin. Personal property held upon execution or attachment, if these provisions be complied with, may be recovered in an action of replevin. We need not cite the numerous cases supporting this position. The action, we think, may be maintained when the personal chattels are held upon a writ of replevin in a case to which the plaintiff is not a party. An officer with a writ of replevin issued against A for property owned by and in the possession of B, who is not a party to the suit, has no authority to deprive B, the owner, of the property. Neither B nor the property is brought within the jurisdiction of the court, for the reason that B is not made a party to the suit. Were the law otherwise the owner would be deprived of his property by an action to which he was not a party, a thing that the law will not permit. It follows that the writ of replevin in the hands of the officer does not protect

Davis v. Gambert.

the possession of the property. As it was taken and is without authority of law, it cannot be regarded as in the custody of the law.

Of course these remarks are not applicable to the case where the party pursuing the remedy was a party to the prior writ. In such a case there could not be a second writ, or a writ of replevin issued, under which the defendant could recover possession of the property, the issues and parties in the second writ being the same as in the first. The defendant in such a case is protected by the bond required to be filed in the writ. But this bond is no protection to a stranger, and is no ground for holding that property of one not a party to the suit may be lawfully taken upon a writ of re-

Under Code, section 3228, the plaintiff in this case has intervened in the first action and set up his title to the property. But this is not an exclusive remedy, as plainly appears both from the language and spirit of the provision.

The earliest statutes of the State provided that "no writ of replevin for property in the possession of an officer by which any writ of replevin shall be brought." Revised Code, 1843 (Blue Book), p. 337, § 2. This provision was not changed in the Code of 1851 and subsequent revisions. It leads to the conclusion that the Circuit Court erred in sustaining the demurrer to plaintiff's petition.

REVERSED.

AMERICAN EXPRESS CO. v. SMITH & CRITTENDEN ET AL.

1. **Attachment: PRACTICE.** The question as to the invalidity of an attachment cannot be raised for the first time in the Supreme Court.
2. ———: **FRAUD: EVIDENCE.** Where it does not sufficiently appear from the evidence that the attachment debtor purchased the goods in question, with the intention of defrauding his vendors, it will not enable them to reclaim the goods from an attaching creditor.
3. **Practice.** The finding of the court upon a question of fact has the same effect as the verdict of a jury, and will not be reversed unless clearly unsupported by the evidence.

Appeal from Woodbury District Court.

THURSDAY, DECEMBER 8.

THIS is an action to recover the value of certain property upon which the plaintiff had procured the levy of an attachment, and which the defendants, Smith & Crittenden and J. M. Phillips, had caused to be released from the attachment by the execution of a delivery bond. The cause was tried to the court and judgment was rendered in favor of plaintiff for \$278. The defendants appeal.

The facts are stated in the opinion.

Clinton, Hart & Brewer, for appellants.

Isaac Pendleton, for appellee.

DAY, J.—About the 10th day of October, 1876, H. S. Field, a traveling salesman for J. M. Phillips & Co., and C. C Cook, a traveling salesman for Smith & Crittenden, together visited W. S. Ressegien, then doing business in Oto, Woodbury county. He was carrying a stock of general merchandise which the agents estimated at from \$2,000 to \$2,400. He stated to them that he had just completed his store building in which he was then doing business at a cost of about \$700. That he had paid for the same, and that his stock on hand

American Express Company v. Smith & Crittenden.

id for. That in erecting his building and in purchasing stock he had used up all his ready money, and in making purchases would have to ask a little credit. He said nothing with reference to any indebtedness of any character. Agents represented these facts to their respective principals thereupon each sold, and caused to be shipped to him a bill of goods.

On the 26th day of October the plaintiff commenced an action against W. S. Resseguen, naming him in the petition as Resique, and alleging that defendant took, stole and carried away and appropriated \$3,455.64 in money belonging to plaintiff. The petition also alleged that the defendant absconded, and was about to dispose of his property with intent to defraud his creditors and prayed a writ of attachment. A writ of attachment issued against W. S. Resique and was levied upon the stock of goods including the bills shipped by Smith & Crittenden & Co., and J. M. Phillips & Co., which were at the time of the levy in the cases unopened. There was a chattel mortgage upon the original stock of Resique executed in September, 1876, for \$149.45, which was levied out of the stock after the attachment was levied. Smith, Crittenden & Co. and J. M. Phillips & Co. soon learned that Resique was in trouble, and took steps to reclaim their goods, and to obtain their release from attachment executed the delivery bond and now sued on.

After the goods were released the plaintiff amended its petition in the attachment proceeding by inserting therein under the name W. S. Resique appears, the name W. S. Resseguen; also inserting as an additional ground of attachment that the defendant had absconded so that ordinary process cannot be served. Plaintiff thereupon procured a second writ of attachment to be issued upon the pleading as amended, which was levied upon the same property as the first writ, except the delivery bond surrendered on the delivery bond. The plaintiff received a judgment against Resseguen for the sum claimed.

American Express Company v. Smith & Crittenden.

As soon as the attachment was levied Ressegien absconded. He had no other property outside of the stock of goods and the store.

I. It is insisted that the attachment is invalid and furnishes no basis for this action, because the petition in the attachment proceeding described the defendant by the name of, and the attachment issued against, W. S. Ressegien. It is claimed that the plaintiff never had any valid attachment of the property of W. S. Ressegien. The petition alleges that the plaintiff sued out a writ of attachment against W. S. Ressegien, and that thereunder the property in question was levied upon by the sheriff. The answer does not deny this allegation but admits the execution of the bond, and alleges that Ressegien had no interest in or title to the goods. No issue was tendered as to the validity of the levy of the attachment upon property of W. S. Ressegien, but from the whole tenor of the answer, the validity of the attachment seems to be conceded. The question as to its invalidity cannot be raised for the first time in this court.

II. It is claimed that Ressegien procured his purchase of the goods by fraud, that therefore no title passed, and the vendors may reclaim the property from either the vendee or an attaching creditor. In support of the position that the purchase was fraudulently effected appellants cite and rely upon *Devos v. Brandt*, 53 N. Y., 462. We think this case falls short of the facts shown to exist in this case. At the time Ressegien made the purchase in question the attachment suit had not been commenced against him. The agents made their own estimate of the value of the stock of goods on hand. He represented truthfully the value of the store building in which he was doing business. There was a chattel mortgage upon the stock of goods to the extent of \$149.45.

It does not appear that he was otherwise indebted, except upon the transactions out of which plaintiff's claim arose. A

The State v. Richart.

It is said, the action upon that claim had not then been commenced and there is nothing whatever in the evidence from which it can be inferred that Ressegien anticipated such a suit. If the action had not been commenced Ressegien would have been abundantly able to pay for the goods in question, and we feel justified in holding that he made the purchase with an fraudulent intention of not paying for them. However, even if it may be from the subsequent proceedings, that he subsequently appropriated the funds of his former employers, it does not appear from the evidence, that he made the purchase with the intention of defrauding his vendors. This is a law action, and the finding of the court upon a question of fact, has the effect of a verdict of the jury and will not be disturbed unless clearly unsupported by the evidence. The findings of fact involved in the judgment of the plaintiff cannot be said to be clearly unsupported by the evidence. The judgment is

AFFIRMED.

THE STATE V. RICHART.

INSTRUCTIONS: POSSESSION OF STOLEN GOODS: PRESUMPTION OF LAW. The instruction stated that the presumption arising from the possession of stolen goods, was one of law, but left to the jury the right to say whether such a presumption warranted a verdict of guilty, and the defendant was not prejudiced by calling it a presumption of law.

PREPONDERANCE OF EVIDENCE: REASONABLE DOUBT. The defendant can only be required to introduce evidence which creates a reasonable doubt whether he honestly came into the possession of stolen goods. An instruction that he must overcome the presumption arising from such possession by a preponderance of evidence is erroneous.

Appeal from Benton District Court.

THURSDAY, DECEMBER 8.

SENTENCE for larceny. Trial by jury; verdict guilty, and sentence. The defendant appeals.

57	245
118	539
57	245
118	98
57	245
122	4
57	245
138	90

The State v. Richart.

Boies & Couch, for appellant.

Smith McPherson, Attorney General, for the State.

SEEVERS, J.—I. The court instructed the jury that:

"5. The possession of property recently stolen, when the possession is unexplained, is *prima facie* evidence of guilt.

1. INSTRUCTIONS: possession of stolen goods: presumption of law.

Hence, if you believe from the evidence, that a or about the time and in the county charged, the wheat described in the indictment was stolen or any part thereof; that it was taken from the barn of the said Saunders in the night time, and was his property, and if you find that such stolen wheat was the next day found in the possession of the defendant, and was sold by him, then the presumption of law is that he is the person who stole said wheat, and you will be warranted in so finding unless the defendant shall satisfy you that he came into the possession of said wheat honestly, and the burden of proof is on him to satisfy you by a preponderance of evidence, that he honestly came into the possession of such wheat."

The first point of this instruction is the same in effect as the instruction given and approved in *The State v. Hessians*, 5 Iowa, 135, but it is insisted to be erroneous because the presumption that may be inferred from the recent possession of stolen property is one of fact to be drawn by the jury and not one of law. A presumption of law should be declared by the court. If, therefore, the court intended to lay down the rule that the presumption was one of law, the instruction should have gone farther and directed the jury if they found the other material facts they should convict. But this was not done. Practically it is immaterial what the presumption is called unless by reason thereof, the jury are directed to convict. For until this is done it remains a presumption of fact, and it is for the jury to say whether, because of its existence, they should find the defendant guilty.

In the instruction in question the jury were told that because

The State v. Richart.

presumption they would be warranted in finding the defendant guilty, but this did not take from them the power to do the reverse. In other words it was for the jury to say whether the presumption was sufficient to warrant them in finding the defendant guilty. We do not think the defendant prejudiced by calling the presumption one of law. *Stover People*, 56 N. Y., 315.

Conceding the foregoing to be correct it is insisted that the instruction is erroneous, because it casts on the defendant the burden to satisfactorily account for the possession of the property. It is insisted the burden never shifts in a criminal case. There is no occasion to determine this question in this case. Because all the court meant by the use of the word burden was, that it was for the defendant to account for possession of the property. It was not for the State to do so when the defendant must introduce evidence explanatory of his possession. Conceding the presumption to be sufficient to warrant the jury should find the defendant guilty unless evidence was introduced by the defendant sufficient to create a reasonable doubt as to his guilt.

It is further insisted the instruction is erroneous because of the direction that the defendant must overcome the presumption by a "preponderance of evidence." pre-
sumption
in ce
vice:
ble The rule of the instruction is that if the jury found the defendant had possession of the property recently after it was stolen they would be warranted in finding him guilty, unless he satisfied them by a preponderance of the evidence he came honestly into the possession of the property.

The thought of the court without much doubt being that the same rule should apply as in cases where the defendant pleads insanity or an *alibi* as a defense, and that in this State the rule is that such defenses must be established by the defendant by a preponderance of the evidence. We, however, think there is a difference between the cases, or if not, the rule

The State v. Richart.

in cases of insanity or *alibi*, when relied on as a defense, should not be extended. Suppose the only evidence introduced by the State was that the defendant was found in possession of the property recently after the larceny, and defendant gave evidence tending to show he came into possession by finding, the rule of the instruction would require the defendant to establish his innocence by a preponderance of evidence. If the evidence as to the finding was in equipoise the defendant must, under the instruction under consideration, be found guilty.

Again it has been held that the good character of a defendant may be shown in all cases, and it is for the jury to determine as to its weight as they would any other fact in evidence. *The State v. Northup et al.*, 48 Iowa, 583. There was evidence tending to show the good character of the defendant in the case before us. Such evidence would not tend to prove either insanity or an *alibi*. But it would have a tendency to prove that a person charged with a larceny was not guilty, and in a case where the only evidence of guilt was the recent possession of stolen property, the jury might conclude that a person of unblemished character had come honestly into possession of the property but was unable to account therefor. The presumption of honesty, which should be indulged in a case where good character is shown, might be sufficient in the estimation of the jury to overcome the presumption arising from the possession of the property.

When the State introduces evidence authorizing such presumption a *prima facie* case is made out. When good character is shown, a presumption of innocence may be indulged. Now it seems to us that the defendant should not be required by a preponderance of evidence to satisfy the jury he was not guilty, but that all he can be required to do is to introduce evidence which creates a reasonable doubt whether he came honestly into possession of the stolen property.

REVERSED.

THE C. I. R. Co. v. THE M. & A. R. Co.

57	249
89	322
57	249
103	97

Roads: RIGHT OF WAY: ABANDONMENT. The provisions of section 1260, Code, as amended by act of 1874, in relation to the abandonment of a railroad line, clearly contemplate there may be an abandonment of part of a constructed railway. Whether an abandonment exists depends upon the circumstances of each case.

—: **STATUTE CONSTITUTIONAL.** The statute, section 1260, Code, as amended by act of 1874, is constitutional. Following *Noll v. D. B. & R. Co.*, 32 Iowa, 66. The constitutionality of so much of the statute provides for "assessing the damages," will not be inquired into in this case, there being a complete remedy at law.

—: **BECK, JUSTICE, dissenting, held:** that a railroad, through its entire extent, must be regarded as a unity; that while there was an intention to complete the work, there could be no abandonment; and that in this case no part of plaintiffs' line had been abandoned.

Appeal from the Polk Circuit Court.

THURSDAY, DECEMBER 8.

The defendant under the right of way act commenced proceedings and sought to condemn a portion of the right of way belonging to the plaintiff and this action was brought to reverse such proceedings. The hearing was had upon petition, exhibits and affidavits filed by both parties. The motion was refused and the plaintiff appeals.

E. J. Boardman and Parsons & Runnells, for appellants.

Trimble, Carruthers & Trimble and *W. W. Baldwin*, for respondents.

JUSTICE, J.—The pleadings are lengthy and it is not deemed necessary to set them out. The material facts we find to be, that in 1865, the Iowa Central Railroad Company was organized for the purpose of constructing a railroad from the "south

line of the State by way of Oskaloosa to Cedar Falls, in Black Hawk county," and previous to 1868, said company procured the right of way for the purpose aforesaid from the town of Moulton to Albia. We do not understand the right of way was procured for the entire distance between said towns, but for a portion of such distance only. Some grading and perhaps other work on said right of way was done by the company aforesaid prior to and possibly during 1868.

In 1869 the Central Railroad Company of Iowa was organized, and it acquired by purchase, all the rights of the company just named south of Oskaloosa, including the right of way, grading, and other work done thereon between Moulton and Albia, and it is the right of way between said towns the defendant seeks to condemn under the right of way act.

Beginning in 1869, and including 1871, the Central Railroad Company of Iowa constructed and purchased a line of railroad from Albia north to Northwood, and the same has been continuously operated.

After 1871 additions were made to said road consisting of about ten miles of coal and side tracks and the erection of four station-houses, and in that and the succeeding year the plaintiff caused the line between the towns of Albia and Moulton to be surveyed. In October, 1874, the last named company became financially embarrassed and a receiver was appointed who had charge of the road until June, 1879. Previous to that time the road was sold under a decree of foreclosure and purchased by a trustee, who under the direction of the court turned it over on the 17th day of June, 1879, to the plaintiff, who had been duly organized in May of that year.

The petition states that neither of said companies abandoned the line or right of way between Moulton and Albia, but the construction of the road between said towns was prevented by financial embarrassment and that plaintiff "now intends and expects to proceed with dispatch to build the whole distance

to Moulton to Albia, or cause it to be built by other parties for the plaintiff and in its interest." These allegations are denied in the answer.

The condemnation proceedings were commenced on the fifth of July, 1879, and the notice to the sheriff directed him to have the right of way aforesaid appraised as the property of the Iowa Central Railroad Company, or its representatives, under and in pursuance of an act of the General Assembly, passed in 1870, as amended by an act passed in 1874, to amend section 1260 of the Code. The notice directed the sheriff to have assessed the road-bed and right of way "excluding the work done thereon."

The act of 1870 is in substance the same as sections 1260 and 1261 of the Code, and the act of 1874 amending section 1260 is as follows:

In any case where a railway constructed in whole or in part has ceased to be operated or used for more than five years, or in any case where the construction of a railway has been commenced by any corporation or person and work on the same has ceased, and has not been in good faith resumed for more than five years, and the same remains unfinished, it shall be deemed and taken that such corporation or person thus in default has abandoned all right and privilege over so much as remains unfinished, as aforesaid, in favor of any other corporation or person which may enter upon such abandoned work as provided in section 1261" of the Code. This statute went into force on the fourth day of July, 1874. Section 1261 of the Code provides that the right of way, work and grading so abandoned may be condemned as other property, "but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway which has not been refunded by them, shall not be permitted to recover the second time, but the value of such road-bed and right of way, excluding the work done thereon when taken for a new

company, shall be assessed to the former company or its legal representative."

I. Has there been an abandonment of the line between Moulton and Albia within the meaning and intent of the 1. RAILROADS: statute? It is insisted there has not, because
Right of way:
 abandonment. there must be an abandonment of the whole road or projected line. That the statute does not contemplate a part of a road shall be regarded as abandoned when the greater portion has not only been constructed but is being actually operated. If such had been the legislative intent, it would, it is said, have been without doubt clearly expressed as being such part which has ceased to be operated or upon which part work has ceased for the period named, should be regarded as abandoned. The question to be determined is one of fact and no general rule can be laid down applicable to all cases. The statute clearly, we think, contemplates there may be an abandonment of a part of a constructed railway.

But the fact that the work of construction has ceased for the period named, may, or may not, amount to an abandonment of a part of the contemplated road. Each case must be solved in accordance with the facts and circumstances.

The usual and ordinary mode of constructing railways, we understand to be, is to commence at a recognized terminus, and prosecute and finish the work of construction continuously from such point. Such was not done in this instance. But when the work of construction was resumed in 1869, at Albia, it proceeded steadily and continuously from that point north, instead of south to Moulton. If there were sufficient reasons for taking this course the evidence fails to so show.

The right of way in question had been procured at that time and grading had been done thereon. Why was it not then or at some subsequent time utilized? Nothing, except the survey above stated, toward the construction of the road was done for a period of five years preceding the fourth day of July, 1879. The case therefore is within the statute unless the reasons

The C. I. R. Co. v. The M. & A. R. Co.

by the plaintiff excuse performance, or tend to show an intent not to abandon the portion of the road aforesaid.

The survey alone does not, we think, show a resumption of work of construction in good faith, conceding it was made July 4th, 1874. Nor can the construction of coal and side tracks, and the erection of station-houses between Albia and Moultonwood, have any tendency to show the road between Moulton and Albia had not been abandoned. Whether it was actually essential the side tracks aforesaid should be constructed has not been shown. But conceding it was, then the intention to improve and extend the road between Albia and Moultonwood has been shown, while that portion between Moulton and Albia, was for the time being, at least, abandoned or permitted to go to waste. There is not a single fact or circumstance which tends to show an intent to resume work of Albia until after the commencement of the condemnation proceeding, and all there is now is an assertion on the part of the plaintiff to either proceed with the work of construction, or have it done by some one in its interest. If this objection under the statute it comes too late. The fact the company under whom the plaintiff claims became financially embarrassed and was placed in the hands of a receiver, and therefore could not finish the work of construction, cannot be regarded as a valid excuse under the statute which embraces such cases or "any case." We have no doubt such a case was contemplated by the statute. Because of financial embarrassments the construction of railways frequently ceases for a longer or shorter period, and the General Assembly in its discretion has fixed a time when the rights obtained by such companies shall be regarded as abandoned.

It is claimed that the statute is unconstitutional for several reasons, which need not be stated. The statute of 1870, which, so far as the present objection is concerned, is identical with that under consideration, was before the court in *Noll v. D. B. & M. R. R. Co.*, 32 Iowa, 66,

The C. I. R. Co. v. The M. & A. R. Co.

and it was there held it was a valid exercise of legislative power. We are therefore relieved from stating the grounds upon which we conclude the statute is constitutional, deeming it sufficient to say the case cited is amply supported by authority.

III. It is further insisted so much of the statute as provides in assessing the damages the "work done" shall be excluded is unconstitutional. This question cannot, unless we depart from a well settled principle of equitable jurisdiction, be determined in this action, because there is a full and complete remedy at law. An appeal has been taken in the condemnation proceedings, and on the trial thereof the plaintiff can offer to prove the value of the "work done," and if it be objected this cannot be shown because of the statute, the plaintiff may reply that it is unconstitutional, and thus there would be raised the precise question we are urged to determine in this equitable proceeding. It is not the province of equity to interfere when there is a complete remedy at law, and especially is this so when it is sought to restrain the action at law pending the hearing in equity.

IV. We deem it proper to say that as the defendant seeks to condemn under the right of way act we have not deemed it necessary to consider the claim made to the right of way in question which the defendant insists was obtained through one Hill. We think the only question in the condemnation proceeding is how much damages has the plaintiff sustained by reason of the appropriation of its property.

AFFIRMED.

BECK, J., *dissenting*.—I. I reach the conclusion that the line of the railroad in question was not abandoned by the plaintiff under any of the statutes which are claimed to be applicable to the case.

I am of the opinion that a railroad is to be regarded as a single work from one end of its line to the other—that the line, however long, cannot, unless under contract, as in

of a mortgage, a deed of trust or other liens, or in the acquisition of the right of way, be broken up and a part of it disposed of and treated as an independent structure. The statutes of the State regard a railroad through its whole as a unity; it is so taxed. A part of the road, except in case of a lien, cannot be sold on execution. I am of the opinion that the whole road through its entire extent is to be treated as a unity. How long a time has a corporation to build a line of road? It is not limited by law. Several of the roads of the State were more than ten years in the construction of their whole lines. Their routes were established by their surveys made for more than ten years prior to their completion. We have held that the survey is a part of the work of constructing a railroad. *C., R. I. & P. R. R. Co. v. Wells*, 51 Iowa, 476 (see p. 482). Now the Central Railroad was surveyed and located from Albia to Moulton; thus the work of construction was begun. The building of the road was prosecuted at the other end. Financial embarrassments and the appointment of a receiver delayed its completion. Just such a thing occurred in the case of more than one railroad of the State. The affidavits filed in the case show that there was no purpose of abandonment of the part of the line in controversy. The work was in contemplation, and not prosecuted on account of the embarrassed condition of the corporation. The part of the road in question must be regarded in connection with the finished and operated portion. While there is an intention of building it, we cannot say that it is abandoned. Of course a long continued failure to build without any cause therefor, we might regard as evidence of abandonment. But causes are shown for the temporary suspension of the work, as financial embarrassment, the receivership, etc., etc.

I think the claim of defendant under the Hill title is without foundation. No right was acquired by the Quincy Com-

Collins v. Davis.

pany to the road. It took possession of the line as a trespasser. In my opinion the judgment of the Circuit Court ought to be reversed.

COLLINS V. DAVIS ET AL.

57	256
81	531
57	256
88	586
57	256
100	133
57	256
137	182
57	256
139	215

1. **Municipal Corporations: CERTIORARI: WHO MAY MAINTAIN.** A citizen and resident taxpayer may maintain an action to annul the proceedings of a city council, in relation to the unlawful reduction of assessments.
2. —: —. The action of the city council in passing upon a petition for the reduction of taxes is a judicial act, and may be reviewed by *certiorari*.
3. —: REDUCTION OF ASSESSMENTS: AUTHORITY OF COUNCIL. The reduction of an assessment by the city council, after the delivery of the duplicate of taxes to the collector, is without authority and void.
4. **Practice: DEMURRER.** A demurrer can be predicated only upon matters appearing in the pleading.

Appeal from Lee Circuit Court.

THURSDAY, DECEMBER 8.

This is a proceeding for a writ of *certiorari*. The petition and amended petition in substance allege that plaintiff is a resident taxpayer of the city of Keokuk, and brings the suit in his individual capacity, and for the public; that the defendants compose the city council of the city of Keokuk; that the assessor of the city of Keokuk for the year 1880 duly assessed the Commercial Bank, a banking corporation under the laws of Iowa, resident within said city, at \$35,000, and returned said assessment list to the city council for equalization, and the board of equalization, after hearing all complaints of any person aggrieved, corrected and amended all illegal and erroneous assessments, before delivering the duplicate of taxes to the collector, which was about the first day of May, 1880; that

was no change made in the assessment of the said Commercial Bank; that on the 15th day of November, 1880, said Commercial Bank presented a petition to the said city council, alleging that the said assessment for 1880 against the said bank was erroneous and excessive, and asking that an equitable amount due from said bank be ascertained, and authority given to receive such amount in payment of all claims of said bank against the bank, and the city council adopted a resolution that the assessment against the Commercial Bank for the year 1880 be fixed at \$17,000, and that the collector be authorized to receipt for the taxes of 1880 on payment of the amount due on assessed value on said amount of \$17,000; the city collector gave a receipt, but the city did not receive from said bank the whole amount due; that the city council in passing said resolution exceeded its authority, and was illegally in reducing at that date the assessment of property against said Commercial Bank; that the clerk of the city council in giving a receipt to the Commercial Bank in full payment of the taxes due the city for 1880, upon the receipt of \$334, acted illegally and exceeded his authority. The plaintiff prays a writ of *certiorari*, and an order annulling the proceedings of the city council with regard to the assessment.

The defendants filed a demurrer to the petition. The court sustained the first and second grounds of demurrer and sustained the third, fourth, fifth, and sixth grounds of the demurrer. The plaintiff elected to stand upon his petition, and refused to further plead, and judgment was rendered against him, dismissing the petition.

The plaintiff appeals from the sustaining of the demurrer sustained.

The defendant appeals from the overruling of the first and second grounds of the demurrer.

The plaintiff, having first served notice of appeal, is to be considered the appellant.

W. B. Collins, for appellant.

J. C. Davis, for appellee.

DAY, J.—I. The first and second grounds of demurrer, which the court overruled are as follows: 1. Because the plaintiff in said application has not such interest in the subject-matter of this suit as authorizes him to bring the same. 2. Because plaintiff has no legal right to sue.

The plaintiff alleges that he is a resident taxpayer of the city of Keokuk, and that the receipt of the money upon the reduced assessment of \$17,000 was illegal, and void, and without authority of law, and contrary to the best interests of the city of Keokuk and the taxpayers of said city, and the whole amount of the tax could have been collected from the Commercial Bank. It may be conceded that in some other States a rule has been adopted which would deny the right of the plaintiff to maintain this action. See *Doolittle v. The Board of Supervisors of Broom County*, 15 N. Y., 155; *Roosevelt v. Draper*, 23 N. Y., 318; *Craft v. Commissioners of Jackson County*, 5 Kas., 518. These cases hold that it requires some individual interest distinct from that which belongs to every inhabitant of a town or county to give the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question, and that the fact of owning taxable property is not such a peculiarity as takes the case out of the rule. A different rule, however, has been adopted in this State. In *State ex rel. Rice v. Smith*, 7 Iowa, 186, and *State ex rel. Byers v. Bailey*, Id., 390, it was held that in a matter of public right any citizen may be relator in an application for a writ of *mandamus*. In *Collier v. Ripley, County Judge*, 8 Iowa, 129, it was held that a citizen and resident of a county interested in the public welfare may petition for and obtain an injunction to restrain a

officer from the commission of an act which would be a public wrong. In *Rice v. Smith, County Judge*, 9 Iowa, it was held that persons who are citizens, voters, and taxpayers of a county may be parties plaintiff in an action to restrain by injunction the expenditures of county moneys by the county judge, in the erection of a court-house at a place which is not the county seat of the county. In *Cornell College v. Iowa County*, 32 Iowa, 520, this court employed the following language: "We entertain no doubt that where the county supervisors assume the exercise of powers not conferred upon them by law, or fail to discharge their duties, so as to involve a breach of trust, a court of equity will, at the instance of a taxpayer, afford appropriate relief." The city council of the city of Keokuk is intrusted with the management of its fiscal and municipal concerns. The petition alleges that the city council has acted illegally, and in excess of its authority in the reduction of the tax in question. Of course, it cannot be expected that the council will institute any proceeding to review and reverse its own action. Unless, therefore, a citizen and taxpayer of the city can invoke judicial aid, no remedy is afforded, and the council may violate the law with impunity. If the act complained of was one imposing an illegal tax upon the plaintiff, he might safely wait until an attempt to enforce the tax should be made. But the act complained of here imposes no tax. It remits a tax to which it is entitled the city is entitled, and thus diminishes the revenue of the city. Unless a taxpayer can interpose for the prevention of such wrong, the city is absolutely without remedy. We are of opinion that the first and second grounds of demurrer were properly overruled.

The third ground of demurrer is as follows: "Because the facts and matters of which plaintiff complains are not judicial, and defendants are not acting judicially in the matter of which the plaintiff complained." On this ground of demurrer the court sustained. That the ac-

Collins v. Davis.

tion of the city council in receiving and passing upon the petition of the bank for the reduction of its taxes, was a judicial act, and that it may be reviewed by *certiorari* is sustained, we think, by the following authorities: *Royce v. Jenney et al.*, 50 Iowa, 676; *Jordan v. Hayne*, 36 Iowa, 9; *Ryan v. Varga*, 37 Iowa, 78; *District Township of Taylor v. Moore*, 39 Iowa, 605; *Smith v. Powell*, 55 Iowa, 215.

The court erred in sustaining the third ground of the demurrer.

III. The fourth ground of demurrer is as follows: "Because the petition shows that said claim against the defendant, the Commercial Bank, of which plaintiff complained, and for which he brings this action, had been considered, passed upon, and settled by said council, and the clerk by authority had received the amount required, and issued a receipt for the same, by which the entire transaction had been closed, long before the commencement of this suit." This ground of demurrer the court also sustained. From the petition it appears that more than six months after the delivery of the duplicate of taxes to the collector, the Commercial Bank presented a petition to the city council claiming that the assessment was erroneous and excessive, and asking that an equitable amount due from the bank be ascertained, and that the city council then adopted a resolution that the assessment against the bank be fixed at \$17,000, and that the collector be authorized to receipt for the taxes on payment of the amount due on an assessed value of \$17,000. It thus appears that the city council did, long after the duplicate of taxes was delivered to the collector, reduce the assessment from \$35,000 to \$17,000. The charter of the city of Keokuk provides: "That the said council shall have power, on complaint of any person aggrieved, to correct or amend any illegal or erroneous assessment before making out or delivering such duplicate to the collector." No authority is conferred upon the council to make any correction or emendation of an assess-

3. — : reduction of assessments : authority of council.

Collins v. Davis.

after the delivery of the duplicate to the collector. Upon the other hand the existence of such authority is by implication denied. In reducing the assessment at the time it was made the council exceeded their jurisdiction, and acted illegally, without authority. The fact that an illegal act has been committed constitutes no reason why parties interested or injured should be denied a remedy. In our opinion the court erred in sustaining this ground of the demurrer.

The remaining grounds of the demurrer are as follows: Because the city of Keokuk had been compelled to bring suit against said bank, and therefore took a less sum in full satisfaction of said claim than at the time of the litigation, and said suit by reason of the payment by said bank of the required amount has, upon production of the receipt of the collector for said taxes, been marked settled and paid. 6. Because said city council, and these defendants, have the right absolutely to compromise and adjust any claims against the city, and compromise or adjust any litigation brought by or against the city, and such action is not a subject for review herein." It is a sufficient answer to the grounds of demurrer to say that it does not appear upon the face of the petition that the city of Keokuk brought suit against the bank for the collection of said taxes, nor that any action was pending between said bank and the city. It cannot be stated that a demurrer to a petition can be predicated only upon matters appearing in the petition. Upon the defendants' appeal the judgment is affirmed. Upon the plaintiffs' appeal,

REVERSED.

Rix & Stafford v. Silknitter.

Rix & STAFFORD v. SILKNITTER.

1. **Attachment: INVALID LEVY.** To make a legal, valid levy upon personal property, the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass. A levy under which the officer does not have actual control of the personal property levied upon, with power of removal, is invalid.

Appeal from Appanoose Circuit Court.

THURSDAY, DECEMBER 8.

THE plaintiffs allege that the defendant, as sheriff of Appanoose county, had in his hands for service an execution against Gilliam & Ogle, and that he took possession of and sold certain property in the petition described, without making any levy thereon.

The plaintiffs further allege that at the time of such seizure and sale they had a chattel mortgage upon said property, executed by H. S. Gilliam and B. A. Ogle, comprising the firm of Gilliam & Ogle, to secure an account amounting to \$45.47, and a note amounting to \$226.56, and that by reason of the wrongful acts of the defendant they are damaged in the sum of \$290.

The cause was tried to the court and judgment was rendered for the defendant for costs. The plaintiffs appeal.

The facts are stated in the opinion.

Vermilion & Vermilion, for appellants.

Baker & Shouls and *Tannehill & Fee*, for appellee.

DAY, J.—The execution under which the defendant acted is in due form. The only question involved pertains to the sufficiency of the levy. The evidence is not contained in the abstract and the case must be determined upon the facts as found by the court.

The court submitted a finding of facts and of legal conclu-

Rix & Stafford v. Silknitter.

substantially as follows: "That on the — day of — in company with M. H. Kirkham, of the firm of Drake Kirkham, execution plaintiffs, the defendant went to the foundry of the execution defendants, which was at the time benched and invoiced to be turned over to the Centerville Foundry Company; that the said Kirkham directed the defendant, who was sheriff of Appanoose county, Iowa, and held the execution as sheriff aforesaid, to levy on the execution defendant's property, situated in and about the foundry, including the patterns in dispute; that the execution defendant, B. A. Ogle, of the firm of Gilliam & Ogle, was present when the sheriff commenced to make such levy and was informed by the sheriff that he had the writ, and that he levied on the property and proceeded to and was levying the writ while said defendant was present, but the defendant left before the levying was completed, directing one of his hands to assist him in handling the property and examining it and turning his hand over to the sheriff's direction; that the defendant undertook to levy on the patterns in said foundry, and belonging to said foundry, which included a large number of patterns situated in a building on the premises, but separated and distant from 50 to 100 feet from the main building, which was locked, the key in the possession of the said Ogle aforesaid; that the sheriff did not open this house and take actual possession of the patterns, but took possession and control of all the goods in and about the foundry mentioned in the return on the writ, and assumed to take possession and control of the patterns in the out building aforesaid, and that he then told Johnson, a member of the company to whom the premises were being turned over and invoiced as aforesaid, who wrote and took the acknowledgment of the mortgage of plaintiffs, that he would not remove the patterns and the goods levied on, mentioning the same and including the patterns and all the patterns belonging to the foundry, which included the patterns in said out building, if he would hold the same and

 Rix & Stafford v. Suknitter.

be responsible for them, otherwise he would remove them. And the said Johnson agreed to be responsible for the same and they were accordingly left in his control and care.

That the actual possession of said out building was not at this time turned over to the said W. S. Johnson or the company of which he was a member, but he was in possession of the balance of the premises actually; that the patterns aforesaid were of the actual value of fifteen hundred dollars. That the aforesaid facts constitute a legal and valid levy upon all the property mentioned in said return, including the patterns situated in said out building; that on the same day but after the levy aforesaid, the said Gilliam & Ogle executed and duly acknowledged the chattel mortgage set forth in the pleading to secure the debt therein named, which remains wholly unpaid, and that there is due thereon the amount set forth therein, as evidenced by the note described therein, to-wit: the sum of ——— dollars, and the court finds said mortgage was duly filed, indexed and recorded on the day after the date thereof, as shown by the mortgage, and that the mortgagors on that day wrote the plaintiffs of the execution thereof at Keokuk, where they resided, and the plaintiffs replied thereto on the next day, when it was received, accepting the mortgage, but that all this, including the execution and recording of the mortgage, occurred after the aforesaid levy; that the defendant never was in said out buildings where the patterns were stored as aforesaid and never handled the same until the day of the sale, and on that day the building was opened and the property exposed to sale by the sheriff and sold by him, but not disturbed or removed by him other than in causing the opening of the building for the purpose of examination and sale, and in selling the same."

The evidence is silent as to what W. S. Johnson did with the property while he held it for the sheriff. The court erred

1. ATTACH-
MENT: in-
valid levy.

we think in holding that the facts found constituted a valid levy upon the property in controversy.

Rix & Stafford v. Silknitter.

order to make a legal and valid levy the officer must do
acts as that, but for the protection of the writ he would
liable in trespass therefor. Rorer on Judicial Sales, sec-
1003, and cases cited. *Quackenbush v. Henry* (Mich.), 9
., p. 120; *Allen v. McCalla*, 25 Iowa, 464, and authorities
l. "The levy must be so made that it identifies or gives
means of identifying what is levied on, so that any prop-
levied on may be made chargeable to the officer, and prop-
not levied on cannot be subsequently claimed. It must
eized manually or by assertion of control that may be made
tual, if necessary, and thus to bring and keep it within the
inion of the law for sale on execution, if needed and for
other purpose." *Quackenbush v. Henry*, 9 Rep., 120. "A
re paper levy is void. The officer should take actual pos-
sion, but removal of the goods is not absolutely necessary;
et there must be actual control and view of the property with
power of removal." Rorer on Judicial sales, section 1002.
ee also section 1005, and *Haggerty v. Wilber*, 16 Johns, 287.

While the patterns remained locked up in the building, and
the key continued in the possession of the owner they were
not subject to the actual control of the officer, nor had he
the power of removal. It is true the officer had the physical
power to break open the building and assume control of the
property. But in doing so he would of necessity materially
change his situation respecting the property. Control and
power of removal is a very different thing from the ability to
assume control and the power of removal.

If the officer had been a mile away from the property, it
could not be said that the property was under his control and
subject to his power of removal, and yet he would have pos-
sessed the same physical power of putting himself in a condi-
tion to assume actual control and the power of removal as in
the present case.

We feel that to hold a valid levy upon personal property
may be made as was attempted in this case, would be adopt-

The State v. Baldwin.

ing too loose a rule. We are asked to render such judgment here, upon the facts found, as the court below should have done. The amount due upon the chattel mortgage is not found, and hence we have no data for the rendition of final judgment. The cause must be remanded to the court below.

REVERSED.

THE STATE V. BALDWIN.

57	266
137	151

1. **Certiorari: ORDER FOR INJUNCTION.** In injunction proceedings the order of a court having jurisdiction of the matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed.
2. ———: **CONTEMPT.** An attachment for contempt is the proper mode of enforcing obedience to a continuing order in the form of a mandatory injunction.
3. ———: **RETURN.** The return of the writ of *certiorari* in this case was sufficient to authorize the examination of the case upon its merits.

Certiorari to Van Buren Circuit Court.

THURSDAY, DECEMBER 8.

THIS is a proceeding in this court for a review upon *certiorari* of the action of the Van Buren Circuit Court in imposing a fine for contempt upon E. F. Baldwin, John Trout, James T. Jones, and Addison Kerr, trustees of a religious corporation called the "Union Meeting House of the Methodist Church." On the 17th day of June, 1880, a writ of *certiorari* issued from this court to the Hon. Robert Sloan, Judge of the Circuit Court of the Second Judicial District, commanding him to certify to this court a transcript of all the records and evidence in proceedings for contempt.

To this writ the said judge made return, and by agreement the case was continued to this term. The material facts are stated in the opinion.

Knapp & Beaman, for the relators.

Tork and Brown, for the respondent.

AY, J.—On the 13th of June, 1878, there was duly filed record articles of incorporation of the “Union Meeting House of the Methodist Church.” These articles provide that the corporation shall consist of five trustees who shall be elected yearly by the quarterly conference of the church. The articles of incorporation contain the following provisions: “It shall be the duty of the board of trustees to admit all evangelical ministers of other churches, at any time the Methodists may desire to use the house themselves.”

On the 24th day of February, 1878, the trustees of the Union Meeting House of the Methodist Church” presented to the Van Buren Circuit Court a petition alleging that W. A. Carter, Josiah Saddler, E. J. Waggoner, Ira J. Hawkins, and others, claiming to be connected with an organization known as the Seventh Day Adventists, had been breaking into said meeting house and injuring the same, and praying a preliminary injunction restraining said Carter and others from further breakings, and from using said house without authority of said trustees. A preliminary injunction was issued as prayed. In December, 1879, a final decree was rendered in the injunction proceeding, the material portion of which is as follows: “It appearing that the present trustees of the Union Meeting House of Lick Creek township, Van Buren county, Iowa, are the following, to-wit, Thomas Baldwin, James H. Trout, Addison Kerr, and Andrew Yost, they are the parties plaintiffs hereto, as the present trustees, and by the appointment of parties upon a full submission of this cause, the court orders that the injunction be made perpetual; that is, the defendants are enjoined from breaking into or injuring the church aforesaid. And the court holds that it is the duty of the said trustees to permit the defendants, or either of them, to the use of said

The State v. Baldwin.

church for religious services when the Protestant Methodists are not using said church for said services, and when there is no other applicant for such purpose. The said trustees are hereby required and commanded to so admit defendants upon proper application."

After this order was made, January 2, 1880, Josiah Saddler applied on behalf of the organization known as Seventh Day Adventists to Thomas Baldwin, who was president of said board of trustees, for the use of the Union Meeting House for the purpose of holding religious services on the 3d day of January. Baldwin said he would not permit them to use the house. Saddler then asked him, as president of the board of trustees, if he would call a meeting of the board of trustees to take the matter into consideration. He said he would not take any action in the matter as president of the board of trustees. On the 8th day of January, 1880, the order of the court in the injunction proceeding was duly served upon said trustees. Upon being served with this order Baldwin caused public notice to be given of a church meeting to be held on the 14th day of February, 1880, for the purpose of taking under consideration and determining what should be done with reference to admitting the "Adventists" to the use of the church.

This notice was given pursuant to the following provisions of the discipline of the Methodist Church: "The trustees shall have power, when authorized by two-thirds of the qualified members of a society at a meeting, for the purpose of which meeting at least four weeks' notice shall have been given, to purchase, build, repair, lease, sell, rent, mortgage, or otherwise procure the disposition of property, and on no other condition or conditions whatsoever.

"Each church or society shall have power, by the concurrent vote of two-thirds of the qualified members, publicly called together for that purpose, to purchase, build, lease, sell,

rent, or otherwise obtain the disposition of property for the benefit of the Protestant Methodist Church."

At the church meeting Saddler and Carter were present, but upon request they withdrew. The meeting then adopted the following resolutions:

"WHEREAS, certain parties holding to the so-called Adventist Church desire the use of a church building known as the Union Church of the Independent Circuit of the Methodist Protestant Church of the Iowa Conference, we, the members said Methodist Church, do by our vote refuse said so-called Adventists the use of said church, for the following reasons:

1. They have caused strife, contention, and hard feelings in the neighborhood.

2. They did break open and abuse said house, and failed to make good the damages done.

3. We do not acknowledge as orthodox a people who deny the immortality of the human soul, and who violate and ignore the Christian Sabbath; who, in theory, deny the resurrection of the dead."

All the trustees voted for these resolutions, and they were adopted unanimously. As soon as the meeting adjourned, and before the persons present had departed, Saddler and Carter again came into the house. The evidence is somewhat conflicting as to what then occurred. We are, however, satisfied from the whole evidence that Saddler and Carter made a request of Baldwin for the use of the house on Saturday the 28th day of February, that Baldwin refused said request, and that the other trustees approved of and assented to the refusal.

At the April term, 1880, of the Van Buren Circuit Court an information for contempt was filed against said trustees, and an order was issued and served upon them that they show cause why they should not be dealt with and punished for a contempt in refusing to obey the order made in the injunction proceeding.

The State v. Baldwin.

The trustees appeared in person and by counsel; testimony was taken; Baldwin was fined ten dollars, and in default of payment of such fine was ordered to be imprisoned three days, and each of the other trustees was fined one dollar. The costs, amounting to \$98.10, were adjudged against the trustees equally.

I. The relators claim that under the sections of the discipline of the Methodist Church set out in the foregoing statement they had no authority to authorize the use of the church building, except as directed by a two-thirds vote of the qualified members of the church at a meeting called for the purpose, and that in obeying such direction they could not be guilty of contempt of court, even if they refused obedience to the order of the court.

We need not determine whether these articles of the discipline apply to the case of admitting evangelical ministers of other churches to the use of the house. If they do, they are clearly inconsistent with the articles of incorporation, which make it a *duty* of the trustees to admit all evangelical ministers of other churches at any time the Methodists are not using the house themselves.

If these articles of discipline in any way qualify the right of the trustees to control the use of the house they should have been presented to the court in the injunction proceeding, and insisted upon as a reason why the order entered in that proceeding should not have been made.

If they were called to the attention of the court in that proceeding, and notwithstanding the court erroneously ordered the trustees to do what is beyond their power, the order may upon proper proceedings be reversed. But the order of the court, even if erroneous, was not void. The court had jurisdiction of the parties and of the subject-matter, and its adjudication cannot be disregarded with impunity. So long as it remains unreversed it must be obeyed. There would be an end of all subordination and social order, if parties could dis-

The State v. Baldwin.

and judicial orders, and when proceeded against for contempt, call in question the correctness of the order itself. In a proceeding the only legitimate inquiry is, did the court have jurisdiction, and did it make an order which has been sustained?

It is further claimed that an attachment for contempt is a proper mode of enforcing obedience to the order in question. The order is a continuing one in the nature of a mandatory injunction. It requires the trustees to admit the parties in question to use of the church for religious services, when the Protestant Methodists are not using it for such services, and when there is no other applicant for such purpose. It is impracticable to enforce this order by execution or other writ. The only way the parties to it can be coerced into obedience is by proceeding against them for contempt. Section 3026 of the Code clearly authorizes this proceeding.

It is claimed by the relators that the return to the writ of *certiorari* is not sufficient to authorize an examination of the merits of the case, because the return fails to recite with sufficient certainty to certify the evidence on record in the case. We are asked to strike out certain portions of the return, and then to reverse the case because the return would not contain enough to justify the action of the court. Relator's counsel impliedly admit that the objections which they make are extremely technical. We have examined them carefully and we feel constrained to hold that they are without merit. We discover no illegality or error in the action of the court below in punishing the relators for contempt.

The court's action is approved and

CONFIRMED.

Gifford v. Cole.

GIFFORD V. COLE.

1. **Bill of Exceptions: BAR DOCKET.** A bar docket is not a part of a court record, and is not available on appeal to show that a case was disposed of out of its order, unless duly incorporated in or sufficiently identified by a bill of exceptions.
2. **Jury: WAIVER OF.** Where the defendant failed to appear at the trial, he will be deemed to have waived a jury.
3. ———: **NEW TRIAL.** The facts in this case excusing default in the court below, are not sufficient to entitle the defendant to a new trial.

Appeal from Scott Circuit Court.

FRIDAY, DECEMBER 9.

ACTION on a promissory note, judgment for the plaintiff and defendant appeals.

C. C. Cole, pro se.

Watterman & Boylè, for appellee.

SEEVERS, J.—The petition was filed on the first day of March 1880. By leave of the court it was verified on the 8th day of April thereafter, and on the 17th day of said month, a verified answer was filed and therein payment was pleaded. The cause was on the docket at the September term, 1880, and it appears from the court record, it came on for trial on the 14th day of September, being the second day of the term, and the defendant failing to appear a jury was waived by both parties, and a trial was had to the court and judgment rendered for the plaintiff. Afterward the defendant moved the court to set aside the judgment and for a new trial, which was overruled. It is assigned as error.

I. "The court erred in taking the case up out of its order on the docket, and without notice to the defendant affording an opportunity to be heard." To show the truth of this assignment the appellant has caused to be

1. BILL of exceptions: bar docket.

ed by the clerk as a part of the record, a docket "printed
all pamphlet form for distribution among the members
bar." Counsel for the appellee insist such docket is not
of the records of the court, and therefore cannot be cer-
to this court by the clerk or become a part of the record
eal, unless it has been made so by a bill of exceptions
igned by the judge, and this we think must be so.
appellant relies on Sec. 197, subdivision 7, and Sec. 2747
Code. The book contemplated in the foregoing is the
arance docket," which is materially different from what
ed the bar docket. The former is by statute made a part
records of the court. Not so with the bar docket. It
known to or recognized by statute. It is not a part of
urt records and can only become such or be made available
eal when duly incorporated in, or sufficiently identified
bill of exceptions. This not having been done we are
e to say this cause was taken up out of its order and
in the court below.

It is next assigned as error: "The court erred in try-
ne cause out of its order on the docket and under such
circumstances as show that a jury was not legally
waived by the defendant." What has been said
es of this assignment except as to the waiver of a jury.
provided by statute: "Trial by jury may be waived by
veral parties to an issue of fact in the following causes
* * by failing to appear at the trial." Code, § 2814.
record shows the defendant did fail to appear, and he
py, we think, waived a jury.

It is lastly assigned as error: "The court erred in
aling the defendant's motion to set aside the default and
grant a new trial." The judgment was not ren-
dered by default, that is because of a failure to
and the real ground, as we understand, upon which this
ment is based, is that the defendant supposed he was
ented by counsel and unexpectedly to him said counsel

Otterbein v. The Iowa State Insurance Company.

withdrew from the case. Affidavits have been filed in support of and against the motion. From a consideration of which we conclude Mr. L. M. Fisher was not counsel for the defendant in this case. He was not employed or even requested by defendant to appear for him on the trial of this action. None of the pleadings were signed by Mr. Fisher. The defendant was not therefore entitled to a new trial on this ground.

AFFIRMED.

OTTERBEIN V. THE IOWA STATE INS. CO.

1. **Insurance: CONTRACT FOR.** Conceding that making application for insurance, and the payment of part of the premium to an agent, created a contract of insurance between the party and the company, yet the insurance company had the power to reject the application and thereby annul the contract.
2. —: **AGENT.** The company having exercised its right to reject the risk, the law will not hold it bound to pay a subsequent loss, because the agent, by arrangement with the party making the application, retained the premium note given and the portion of the premium paid, while attempting to induce the company to reconsider its action.

Appeal from Linn Circuit Court.

FRIDAY, DECEMBER 9.

THIS is an action in chancery asking for a specific performance of a contract to issue a policy of insurance, and to recover thereon the value of the property covered by the contract, which has been destroyed by fire. There was a trial upon the merits and a decree entered dismissing plaintiff's petition, from which he appeals.

C. J. Deacon, for appellant.

Craig & Collier, for appellee.

BECK, J.—I. The plaintiff alleges in his petition that he made application to defendant, through its general agent, for

Otterbein v. The Iowa State Insurance Company.

upon a house, a stock of goods and other property, at the same time paid to the agent a part of the premium, and from him a receipt in the following words:

Incorporated 1855. Oldest Company in the State. \$12.00. Rapids, Nov. 24th, 1879. Received of Philip Otterbein Esq., twelve dollars, being the cash premium of five dollars on application for insurance in the Iowa State Insurance Company at Keokuk, Iowa, which amount is a part of the premium for the first year. Also 50 cents policy and fee.

CURTIS WELLS, Gen. Agent."

Plaintiff further alleged that defendant accepted the plaintiff's application and thereby became bound to issue to him a policy, but it has failed and refuses to do. It is also shown that two months and a half after the application was made, plaintiff's property was destroyed by fire. The relief claimed by plaintiff is that defendant may be required to specifically perform its contract to issue the policy, and that judgment be rendered for the value of the property destroyed, which is fully covered by the amount insured thereon under the contract relied upon by plaintiff.

Defendant's answer admits that plaintiff made application for insurance, accompanied by his note for the premium, which was sent to defendant, but that the application was rejected on the reason that the premium named therein was insufficient, and thereupon the application and note for the premium were returned to the agent, and plaintiff's note and money by plaintiff were tendered back to him.

Other allegations of the pleadings need not be here recited.

We need not inquire whether the application and the payment of a part of the premium and other facts of the case

created a contract of insurance, but for the purpose of the case we may concede that they did.

If such contract existed, we are very clear that it was to be annulled upon the rejection of the application. The evidence leads to this conclusion. The agent was not

Otterbein v. The Iowa State Insurance Company.

authorized to issue policies, and the assured made the application with the understanding that it was to be sent to the defendant for acceptance or rejection.

The testimony shows that the application was rejected by defendant, and together with the premium note was returned to the agent who received them from plaintiff. The part of the premium paid was not sent to defendant, but retained by the agent. The plaintiff was informed by the agent that the risk was rejected, and that it would not be taken by defendant, except at a higher rate of premium, which plaintiff refused to pay. Thereupon conversation was had between the agent and plaintiff in regard to placing the risk in another company, and the plaintiff in his testimony declares that the agent informed him he would bring the matter again before the directors of defendant. Whatever may have been the understanding between plaintiff and the agent, certain it is that the plaintiff knew that defendant had declined the risk, except at a higher rate of premium, which plaintiff refused to pay.

III. The plaintiff insists that the risk was not canceled by defendant because the premium note and premium paid by
2. ———; plaintiff were not returned or a tender thereof
agent. made to him. The testimony leads us to the conclusion that plaintiff not only knew the defendant had rejected the risk but acquiesced therein. He admits that he understood the agent proposed to send back the application to the defendant and for this reason the note and premium were not given to him. He knew that defendant was authorized to decline the risk, and that after it was rejected he could have no claim against defendant upon the contract.

Defendant having exercised its right to reject the risk, the law will not hold it bound because the agent and the assured united in an attempt to induce it to reconsider its action and issue the policy. Surely the agent and plaintiff could not, by such an arrangement or any other, annul the action of the defendant in rejecting the risk. The agent professed no power

Otterbein v. The Iowa State Insurance Company.

such a thing, and of course plaintiff had no authority to the defendant's rejection of the risk. The application been rejected, defendant's contract, if one existed, was atated. Any other view of the case would deprive defendant of the right to reject risks and subject it to such unauthorized contracts as the agent and assured might enter

retention of the premium note, and of the part of the premium paid, by the agent was under the arrangement that the subject was to be again brought before the directors of defendant, to which plaintiff assented. It cannot be claimed that the defendant continued to be bound by its contract on the ground that the premium and note had not been tendered or returned to plaintiff. By the arrangement with the agent just stated, plaintiff waived the tender and return of the pre-

vious views, which are very satisfactory to our minds, disposing of the case, and render unnecessary the consideration of the doctrines advocated by defendant's counsel and supported by many authorities, in an able argument. These doctrines are in conflict with our conclusions. They are not applicable to the case in the view we take of it.

AFFIRMED.

57	278
85	703
57	278
114	689
57	278
117	539

WILCOX v. JACKSON.

1. **Estates of Decedents:** FILING CLAIMS: STATUTE OF LIMITATIONS.

Where a party informed his attorneys of his claim against an estate, and supposed they had filed the same, but by mistake the claim was not filed until long afterwards, the case presents such equitable circumstances, excusing the failure to file the claim within one year after notice of taking out letters of administration, as to remove the bar of the statute of limitations.

2. ———: VARIANCE: PRACTICE. A party is not bound to prove number and price exactly as alleged; it is essential only that the substance of the issue be proved, and the objection not having been presented to the court below, cannot avail here.

Appeal from Monroe Circuit Court.

FRIDAY, DECEMBER 9.

THIS case was before us on a former appeal. See 51 Iowa, 296, to which, for a statement in part of the case, reference is here made. The cause having been remanded to the court below, the defendant filed an amendment to his counter-claim as follows: "That there are equitable circumstances entitling the defendant to relief and that the counter-claim though not proved within one year after the giving notice by the administratrix of her appointment is not barred.

Said equitable circumstances are as follows: Defendant filed said counter-claim in the office of the clerk of this court on the 27th of February, A. D. 1877, before the expiration of one year from the giving of notice aforesaid by the administratrix, duly sworn to as the law requires. That it was filed in the form it now appears, as the counter-claim in this case that was then pending; that the plaintiff was at that time present and in court appearing to the counter-claim.

That on the first day of March she filed a reply to the counter-claim denying each and every allegation therein; that this was still within the year from the giving notice by the administratrix; that no objection was made to the time of fil-

Wileox v. Jackson.

the claim or that it was barred. Defendant further states that the one year from the giving of said notice expired on the 1st day of March, A. D. 1877.

He further states that had not the plaintiff filed a reply on the 1st of March, and interposed this as an obstacle to the trial of the claim he would have proved it within the year. He says that it is owing to the plaintiff's own act as aforesaid that the defendant was prevented from proving up said claim. He further states that had he filed the counter-claim in the September term, 1876, he could not have proved it at that term owing to the number of cases on the docket and the amount of business before it, and the cause would have had to be continued, as it in fact was, and it would not have been proved.

Defendant further avers that the reason the case was not tried at the February term, 1877, was owing to the reply filed by the plaintiff raising the general issue and the press of business in court having precedence on the docket. He further avers that ever since the filing of the counter-claim he was ready, willing and anxious to try said case and prove it, and it was not through any hesitation, tardiness or delay on his part that it was not proved at once and before the year expired. Defendant states that it was not until at the September term, 1877, on the first day of October, the plaintiff thought of interposing the plea of the statute of limitations. On that day for the first time the plaintiff interposed the defense to the counter-claim and filed an amendment to the reply, and the case could not be tried at that term owing to the pressure of the plaintiff as aforesaid and the amount of business in court having precedence.

That it was not through any fault of defendant that it was not tried and it was continued to the February term, A. D.

the defendant says he filed the claim within the year and that for the resistance of the plaintiff would have proved it

Wilcox v. Jackson.

within the year, and he insists that he should not be deprived of the right of recovery when the delay was caused by the plaintiff and the press of other business in the court.

The defendant filed a demurrer to this amendment to the counter-claim, which the court overruled. The defendant also filed a further amendment to his counter-claim, as follows:

"1st. That as a part of the contract stated in said counter-claim it was expressly agreed that said Jeremiah Wilcox should pay a certain note, made by this defendant as principal and said Wilcox as his surety thereon, to Monroe county for the use of the school fund for \$500.00 secured by mortgage on this defendant's real estate and such payment when made by said Wilcox was to be payment to that extent on the debt to the defendant from said Wilcox for the cattle sold and delivered to him as shown in said counter-claim; that suit was brought in this court by said Monroe county on said note and mortgage against this defendant and his wife and judgment rendered against this defendant by this court February 26th, 1878, for \$827.78 and \$65 attorney's fees and costs and said mortgage foreclosed; that no part thereof has been paid.

"2d. He alleges that he resides in the northwest township of the county, and that during the year 1876, and especially previous to September of said year, he was almost constantly on or about his premises attending to his farming business which occupied about all his time; that he can neither read nor write, and during the years 1876-7 he took no newspaper published in said county, and prior to service of notice upon him in this case, to-wit: September 14, 1876, he was not aware, and had no knowledge that said Sarah J. was the administratrix of said Jeremiah Wilcox's estate; that prior to the filing of the counter-claim herein he had no information or knowledge in fact that said notice of said Sarah J's. appointment as administratrix of said estate had ever been given.

"3d. He further states that at the September term, A. D.

Wilcox v. Jackson.

of this court, he employed Perry & Townsend, attorneys of this court, to defend for this defendant in this case, in case No. 880, in which said administratrix was plaintiff and this defendant was defendant; that in pursuance of employment, said attorneys prepared answers in each of cases, and filed the same; that at or about the same time he informed his said attorneys of his said claim against state for said cattle so sold and delivered, and employed them to prosecute the same, and he had a subpoena duly issued for his witnesses, by whom he expected to prove said claim, requiring them to appear and testify in said case at said December term, and that said witnesses attended this court at said term, for the purpose of testifying in regard to said claim. He further states that he is advised and believes, and so swears, that the fact to be, his said attorneys at said September term of this court prepared the said counter-claim as it now stands, except as to the verification for the purpose and with intent of having the same duly verified and filed at said December term of said court; that he fully believed and reposed upon said belief that said counter-claim had been duly verified at the said term of said court, and upon the continuance of said cause at said term, he returned to his residence. He further states that some few days prior to the February term of said court, 1877, he came to Albia, Iowa, for the purpose of getting subpoenas for his witnesses, to prove up said claim, but did not get the same and had his witnesses subpoenaed and in attendance, to prove up said claim whenever said claim could be reached for trial. That during all the time from said September term to the 27th day of February, A. D. 1877, he reposed upon the full belief that said claim had been duly filed at the September term aforesaid, and that all things in that respect that the law requires had been complied with. That on the 27th day of February, 1877, he was informed by one of his attorneys that said claim had not been sworn to nor verified. Whereupon he duly verified the same and said claim

Wileox v. Jackson.

was duly filed. He further states that the cause of the delay in the filing of said counter claim was the result of accident or mistake. That his said attorneys had prepared the answer in this and in case No. 880, and pleadings in numbers of other cases pending then in said court, and their whole attention was engrossed and engaged in cases in court in the order in which they were or might be reached for trial. That this case, with a number of others, was continued, it being ascertained by the court that it was impossible to try the same at that term of court. The said counter-claim was, by accident, placed with other papers in the office of his attorneys at said September term, and there remained until February 27, 1877, when, in searching for other papers, this counter-claim was found among other papers, and it was then first discovered that it had not been filed and sworn to; that his attorneys all the while from said September term to February 27, 1877, were under the impression and full belief that said counter-claim had been duly sworn to and filed, and that the same would be tried at said February term if it could be reached; that it was not tried at that nor at the next October term of said court, was owing to the fact that there were other cases pending in said court which had priority of right to be tried, and which occupied all the time of said court during said two terms.

"He further states that said estate of said Jeremiah Wilcox still remains unsettled and that there is ample and abundant assets to pay all the demands and claims against said estate.

"He states that since the procedendo was issued by the clerk of the Supreme Court to this court he has been at every term of this court ready and willing to try this case, and that it has been continued without any fault on his part."

The plaintiff filed a demurrer to this amendment, which the court overruled.

The cause was tried to the court, and a finding of facts submitted, upon which the court established a claim against the

Wilcox v. Jackson.

te in question for \$722.50, as a claim of the fourth class, ordered that the administratrix pay the same out of the ts of the estate. The plaintiff appeals.

Henry L. Dashiell, for the appellant.

Perry & Townsend, for the appellee.

DAY, J.—The evidence is not contained in the abstract and ce the finding of the court must be regarded as embodying facts of the case. The court submitted a finding of facts ollows:

1. In the fall of 1873 Jerre Wilcox, now deceased, and ry Saunders were partners in buying and selling cattle live stock. Said Wilcox furnished all the purchase-money, each sharing equally in the profits and losses. That about last of September or first of October, 1873, these parties chased of the defendant, N. P. Jackson, fourteen steers, aging 1,200 pounds in weight, at four cents per pound, four cows averaging 950 pounds, at two and one-half cents pound, amounting in all to \$767, on which \$20 was paid, ing due \$747.

2. That at the time this purchase was made said Wilcox present making the purchase, or at least assisting in mak- the purchase, and said purchase was made in his name, said Jackson understood at the time that said Wilcox was e paymaster to him for said cattle, and it was verbally eed between these two at the time, that said Wilcox was pply a sufficient part or portion of the purchase-price of cattle to the extinguishment of a certain school-fund note principal of which was \$500, given by said Jackson as cipal and said Wilcox as surety, and that said Wilcox then ally agreed to assume and pay off said note, and I find as between these parties, Wilcox and Jackson, said school l debt became thereafter the debt of Wilcox.

3. I find that said school-fund note became due and pava-

Wilcox v. Jackson.

ble December 19th, 1874, and I further find that on the 31st day of December, 1873, interest was paid on said note to the amount of \$40. The evidence does not show by whom this interest was paid, but inasmuch as it was the duty of Wilcox to pay it, and no longer Jackson's duty (as between the parties), I deem it fair to presume that Wilcox did his duty in this respect at least. (1 Greenleaf on Ev., Sec 40), and I therefore find that Wilcox made this payment.

"The evidence also shows that there were other installments of interest paid on this note, but as they were paid after the note became due Wilcox should not be credited with the payment of any further amount except the interest that would accrue from December 31st, 1872, to the time the note became due; to-wit, December 19th, 1874, as it was his duty to pay off the note when it became due and stop the accumulation of interest. I further state that the evidence does not show by whom any of these installments of interest were paid.

"4. I also find that in the year 1874, being after the said cattle were purchased, that said Jackson executed to said Wilcox his promissory note for \$125, on which said Jackson was subsequently sued and judgment rendered thereon against him, and this raises a presumption that the balance of the purchase-price of the cattle that had not previously been adjusted was then settled and paid (*Grimmell v. Warner*, 21 Iowa 12), and I find that Jackson then received pay for said cattle except the amount that it would take to pay off said school-fund note, which had previously been assumed by said Wilcox.

"5. I find that said Wilcox never paid any of the principal of said school-fund debt, but that his estate still owes said Jackson the principal of said note, being \$500 with six per cent interest from the date of the purchase of said cattle; to-wit, October 1, 1873.

"6. I find that the evidence sustained the equitable circumstances alleged by the defendant in the amendments to his

er-claim and relied on by him to remove the bar of the
e, which I find sufficient for that purpose.
he court also finds that the allegations of plaintiff's re-
s to the time of her appointment as administratrix and
me notice thereof was published are established by the
nce."

It is claimed that the facts alleged in the amendments
e counter-claim, and found by the court to be established
by the testimony do not constitute such equitable
circumstances as will excuse the failure to prove
the claim within one year of the giving of notice
e taking out of letters of administration. In the last
dment to the counter-claim it is alleged amongst other
s that the defendant informed his attorneys of the exist-
of his counter-claim at the September term, 1876, and
during all the time from said September term to the 27th
February, he relied upon the full belief that his claim had
filed at the September term, and that all things that the
requires in that respect had been done, and that said coun-
aim was by accident placed with other papers in the of-
f the attorneys at the September term and there remained
February 27, 1877, when it was found, and it was first
vered that it had not been sworn to and filed. Mistake
accident are favored grounds of equitable relief. If the
ter-claim had been filed at the September term, 1876, and
account of continuance resulting from the application of
plaintiff, or the press of business of the court, had not
proved until after the year expired, the client's claim
d not, under the former decisions of this court, have been
ed. We have now a case in which it was the intention to
he counter-claim more than six months before the year
ed, in which the defendant supposed it had been so filed,
n which the omission to file resulted from accident or
ake. We think the circumstances alleged in the second

 Wilcox v. Jackson.

amendment to the counter-claim are sufficient to remove the bar of the statute of limitations.

II. The original counter-claim alleges that the defendant sold and delivered to Wilcox nineteen head of fatted cattle, for which Wilcox undertook and promised to pay the sum of eight hundred and sixty dollars.

The court found that Wilcox purchased of the defendant fourteen steers, averaging 1,200 pounds, at four cents per pound, and four cows averaging nine hundred and fifty pounds, at two and one half cents per pound, amounting in all to \$767. It is claimed that the contract which the court has found is not the contract upon which the defendant claims, and that, therefore, the court erred in establishing a claim against the estate.

The defendant was not bound to prove the exact number and price as alleged in his counter-claim. It is essential only that the substance of the issue be proved. 1 Greenleaf on Evidence, Sec. 56: "In general the allegations of time, place, quantity, quality, and value, when not descriptive of the identity of the subject of the action, will be found immaterial, and need not be proved strictly as alleged." 1 Greenleaf, Sec. 61. Besides, so far as the record shows, this objection is raised for the first time in this court. No objection is shown to have been made to the proof when offered. It is not shown that there was any variance between the proof and allegation which was prejudicial to the plaintiff. If the objection had been made in the court below, the court might have ordered any immediate amendment without costs. See Code, §§ 2686 and 2687. The objection not having been presented in the court below cannot avail here. The judgment is

AFFIRMED.

Alexander v. McGrew.

ALEXANDER V. MCGREW ET AL.

Practice: CERTIFICATION OF EVIDENCE. Where the certificate does not purport to be attached to any evidence, and does not properly identify the evidence, it is defective.

—: ON REHEARING. Defects of certificate and abstract considered.

Practice in Supreme Court. *Held*, that the appellee may supply evidence and still insist the certificate is defective; that the objections to the certificate need not be specifically set out; that the party having the burden of proof, in a trial *de novo*, is entitled to the opening argument; and that overruling a motion to strike out the evidence, will not preclude the court from determining whether the record is such that the case can be examined upon its merits.

Appeal from Clarke District Court.

FRIDAY, DECEMBER 9.

MOTION to foreclose a mortgage. Defense usury. Decree affirmed. Plaintiff. Defendants appeal.

Quart Bros. and **Henry Stivers**, for appellants.

L. Karr, for appellee.

DAMS, CH. J.—The appellee insists that the judge's certificate to the evidence is insufficient, and that the judgment must, for this reason if no other, be affirmed. The certificate set out in the appellant's abstract is in the following words:

Be it remembered that this cause was submitted to the court upon the following, and no other evidence, and that the foregoing constitutes all the evidence in the case:

On the part of the defendants: Testimony of R. F. McGrew; deposition of W. H. Hall.

On the part of plaintiff: Note and mortgage of defendant; deposition of L. M. Wilson; deposition of W. H. Alexander.

On rebuttal: Testimony of R. F. McGrew.

 Alexander v. McGrew.

And the foregoing is signed in open court as evidence of the facts herein contained, this November 27, 1879.

R. C. HENRY, *Judge.*"

Section 2742, Miller's Code, provides that all evidence offered upon the trial shall be taken down in writing, except where the evidence is taken in the form of depositions, as may be done. It also provides that all evidence so taken shall be certified by the judge, be made a part of the record, and go on appeal to the Supreme Court.

In the case at bar the certificate does not purport to be attached to any evidence, nor does it refer to any testimony as taken in writing, except the deposition of one witness. The certificate shows merely the names of the witnesses and the side upon which they were introduced, respectively. We cannot think the certification of the names of the witnesses is a certification of the evidence within the meaning of the statute. There should be some clear and unmistakable means of identifying the evidence from the certificate. There should not be less certainty in regard to the evidence in an equitable action, when brought to this court, than in regard to the evidence in an action at law, when embraced in a bill of exceptions. We can but think, therefore, that the certificate in this case is insufficient and that the appeal must be

DISMISSED.

ON REHEARING.

ADAMS, CH. J.—The question upon which this case was decided was not as to whether the abstract was defective, but as to whether the certificate of the trial judge was defective; and we held that it was.

It is true, the abstract is also defective, in that it contains no statement that it is an abstract of all the evidence, and the
 2. —: case is triable *de novo*, if at all. But the appel-
 —, lee makes no objection to the abstract upon this ground; and what is more, he files an amended abstract, and sets out the evidence upon which he relies. So far, then, as

Alexander v. McGrew.

effect in the abstract is concerned, the case is brought within the rule in *Starr v. Burlington*, 45 Iowa, 92, the appeal could not be dismissed upon that ground. It is our duty to proceed precisely as if the abstract had contained a statement that it is an abstract of all the evidence. If the abstract contains such statement, we assume not that it is true, but that the evidence was made of record by due certification, unless it is made to appear to the contrary.

But in this case, it is made to appear that the evidence was not made of record by due certification. The certificate is without, and it is a mere certificate of the names of the witnesses, and not of the evidence. The appellant insists that it is a certificate of the evidence, because the testimony of the witnesses is referred to, and he contends that we ought to assume that reference is made to the report of the referee. We find indeed what purports to be a report of a referee, and in it we find a statement that the testimony taken was returned into court; and the names of the witnesses in the report appear to correspond with the names of the witnesses in the certificate. But there is no certificate of the judge as to what was returned into court. To determine that we must rely upon something which the law does not make the evidence of fact.

The certificate is defective for another reason. It does not state that the testimony of the witnesses mentioned was all the evidence offered. *Taylor v. Kier*, 54 Iowa, 645.

Now we understand the appellant, he claims that it is immaterial whether there was any certificate at all or not, inasmuch as the appellant sets out certain evidence or what he claims to be such. And the appellee, by an amended abstract, undertakes to supply all deficiency.

It is the appellee's right, through caution, to supply all the evidence which he desires, and still insist that the evidence was not properly certified. That is what the appellee in this case did.

Alexander v. McGrew.

The appellant contends that the form of the objection made by the appellee to the sufficiency of the certificate is not such as to justify us in holding it insufficient. The objection is made in these words: "The certificate of the judge as to the evidence is uncertain, vague, and not such as the law requires."

The appellee is not required to set out his objection specifically as in assigning error. The statute prescribes what the certificate shall be, and we think that it is enough for the appellee to say that it does not conform to the statute.

But it is said that the appellee had the right to make the opening argument; that he allowed the appellant to make it, and that he should now be confined simply to a reply, and that all other points made by him should be disregarded.

The opening argument in a case triable *de novo* in this court should be made by the party having the burden of proof. The defendants admitted the execution of the notes and mortgage, and set up usury as their only defense. The burden of proof then was upon the defendants.

Finally, it is said that the appellee filed a motion before the submission of the cause to strike out the evidence; that the motion was overruled, and that he ought, therefore, now to be precluded from insisting virtually upon the same thing on the hearing.

Our practice is not to strike out the evidence upon motion where we have any considerable doubt as to what ought to be done, or where a proper ruling would require a somewhat careful or extended investigation of the abstract. We either overrule the motion or require it to be submitted with the case. Where we overrule the motion, we do not consider ourselves precluded from determining whether the record is such that we can properly proceed to the consideration of the case upon its merits, especially where the appellee insists in his argument that we cannot.

The former opinion must be adhered to, and the appeal dismissed.

Martindale v. Burch.

MARTINDALE V. BURCH.

Chattel Mortgage: RELEASE OF: ASSIGNMENT OF NOTES:. Where a mortgage given to secure several notes, was released of record by the mortgagee, who had previously assigned the notes and supposed they had been paid, such release will not discharge the mortgagee as to any of said notes, in the hands of an assignee, remaining unpaid.

Appeal from Adams Circuit Court.

FRIDAY, DECEMBER 9.

This is an action to recover for the foreclosure of a chattel mortgage. There was a decree for the defendant. Plaintiff appeals. The facts of the case appear in the opinion.

Maxwell & Spurrier, for appellant.

Wells & Russell, for appellee.

THROCK, J.—On the 24th day of November, 1866, J. O. Scoby and Geo. W. Hopp, executed and delivered to George King a chattel mortgage upon certain printing presses and printing material, to secure the payment of over two thousand dollars, for which certain negotiable notes were given to King. Among these notes there were ten for the sum of \$80 each, included in the mortgage as of the date of August 7, 1876, and the first one to become due December 15, 1876, and one to become due on the 15th of each month thereafter. The note for which became due on June 15th, 1877, was by mistake paid on June 15th, 1876, instead of August 7, 1876, as intended by the parties. On June 10, 1877, this note was included and transferred by King to the plaintiff. On the 2d of January, 1879, defendant purchased the printing office materials of Scoby & Hopp.

The question to be determined is whether the defendant by

Martindale v. Burch.

his purchase of the property from Scoby & Hopp holds it discharged of the lien for the amount of the note indorsed by King to the plaintiff? As between the parties to the mortgage and note, the mistake in the date of the note was wholly immaterial. The mortgage secured the debt, and a mere mistake in the date of the note was of no consequence. Notes secured by mortgage may be renewed and new notes taken, and the mortgage remains security for the debt. These rules of the law are so familiar and well settled as to require no citation of authority for their support. It remains to be determined whether the defendant Burch has any rights in the matter in controversy superior to those of the mortgagors. This depends somewhat upon the evidence. It appears that when he made his purchase a number of the other notes were still unpaid and were held by one Sigler, who also had possession of the mortgage. Burch paid these notes, and on inquiry of Sigler, Scoby and Hopp, was assured that there were no other notes outstanding and unpaid. He had no actual knowledge that the note in suit was owned by the plaintiff, nor that it was in existence. The mortgage at that time was of record and not released. After Burch paid the Sigler notes, Sigler wrote to King and procured a written release of the mortgage. The release expressly states that King has no interest in the notes secured by the mortgage, having transferred them to other parties.

When King indorsed the note in suit to the plaintiff the effect thereof was to transfer the lien of the mortgage *pro tanto* and no assignment of the mortgage was necessary. That an assignment or transfer of a note secured by a mortgage operates as an assignment of the mortgage lien is a settled rule of the law. This transfer of the lien was in no manner affected by the mistake in the date of the note. Burch was not in the least prejudiced, deceived, or misled by the mistake. He was charged by the record of the mortgage with the correct amount of the note and time of its maturity. Was his reliance upon

1. CHATTEL
mortgage :
release of :
assignment of
note.

Martindale v. Burch.

the information which he received from the mortgagors and Sigler sufficient to protect him from the establishment of this note as a lien upon the property? It appears to us very clear that it was not. That a purchaser of mortgaged property may safely rely on the statements of the mortgagor, that the debt had been paid, is a proposition that no one would contend for. The possession of the mortgage by Sigler was a circumstance tending to mislead defendant. But this was clearly insufficient. The mortgage secured the payment of twenty-two notes in all, and the notes having been transferred to different persons, one only could have possession of the mortgage. The mortgage recites that payment of the notes shall be made to King, his heirs, assignees, etc., and the defendant was charged with notice of such assignments as had been made.

The case is triable anew in this court and a decree may be entered here or in the court below in accord with this opinion, at the option of appellant. The note in suit provides for attorney's fees and no evidence was introduced in the court below of the value thereof. The decree will be that \$80 with interest at ten per cent per annum from August 7th, 1876, be established as a lien upon the mortgaged property.

REVERSED.

ROTHROCK, J.--Since filing the foregoing opinion, our attention has been called to a mistake in the recital of facts therein. The mistake consists in the statement that Sigler as well as Scoby and Hopp assured the defendant that there were no other notes outstanding and unpaid. It does not appear that Sigler made such representations. He was inquired of by defendant whether or not he knew of any other notes than those held by himself, and whether or not he made answer to such inquiry does not appear. The affirmative representations appear to have been made by Scoby. This correction in no manner affects the principle or rule of the opinion, and is made merely for the purpose of having an entirely accurate statement of the facts.

SMELTZER V. LOMBARD ET AL.

1. **Principal and Agent: GOOD FAITH.** The agent of a party for the negotiation of a loan, procured a mortgage from the parties seeking a loan, placed it upon record and then, the loan not having been effected, caused the sheriff's deed under the foreclosure of a prior mortgage to be conveyed to another. *Held*, that good faith required the agent to procure the release of the mortgage, before taking title to the premises, and that the sheriff's deed so procured would be set aside.

Appeal from Union Circuit Court.

FRIDAY, DECEMBER 9.

THIS is an action in equity, the object of which is to set aside and cancel a sheriff's deed to certain real estate of which plaintiff claims to be the owner and to restrain the defendants from prosecuting against plaintiff a certain action for the possession of the premises founded upon said deed. There was a decree for the plaintiff. Defendants appeal.

Stuart Bros. and Ettin, for appellants.

J. H. Copenhaffer, for appellee.

ROTHROCK, J.—The plaintiff was the owner of a farm upon which there were judgment and mortgage liens to an amount somewhat exceeding \$800. The defendant James L. Lombard was cashier of the Bank of Creston, a private banking institution in which the defendant B. Lombard was interested as owner in whole or in part. Nearly all of the judgment and mortgage liens upon the plaintiff's land were held by B. Lombard as assignee of the original parties plaintiff thereto. One of the mortgages had been foreclosed and the land sold thereunder in the month of August, 1877. In the month of January, 1878, the plaintiff made application to James L. Lombard for a loan of sufficient money to pay off all liens on said land

Smeltzer v. Lombard.

and proposed to secure the payment of the loan by a mortgage which should be a first lien upon the real estate. An instrument in writing was drawn up and signed by the plaintiff by which he constituted the Bank of Creston his agent to procure a loan for him for \$800, to be secured by mortgage upon the land in question, and providing that all the liens on the land should be removed before the loan should be completed. By another instrument in writing the plaintiff bound himself to pay to James L. Lombard \$80 as a commission for services in procuring the loan. An abstract of title was procured and the note and mortgage were executed by plaintiff and delivered to James L. Lombard. The note and mortgage were made payable to the defendant Gay who is a non-resident of this State. Lombard took possession of the note and mortgage and put the mortgage upon record. It was found that the sum of \$800 was insufficient to pay all the liens upon the land and the commission to James L. Lombard for his services as agent of the plaintiff. The plaintiff claims that he supposed the amount would be sufficient for that purpose. The defendants claim that the evidence shows that plaintiff knew that it was insufficient. It is further claimed by the defendants that plaintiff expected to purchase certain of the liens at a discount, and thus liquidate all the debts with the loan. On these questions there is conflict in the evidence which, in the view we take of the case, we do not think it important to attempt to reconcile. The defendant James L. Lombard retained the note and mortgage and while they were in his possession, as he claims, as the agent of the plaintiff, on the 20th day of September, 1878, he caused a sheriff's deed to be made to B. Lombard, Jr., on the foreclosure, the period of redemption having expired. Proceedings were instituted before a justice of the peace to obtain possession of the land under this deed, and this action was thereupon commenced to set aside the deed and restrain said proceedings.

It is insisted by the appellants that the evidence shows that

Smeltzer v. Lombard.

the plaintiff failed to perform his contract with the agent Lombard, in effecting the loan. That he knew that B. Lombard, Jr., was the owner of the certificate of purchase at sheriff's sale, and that he should have paid the balance of the amount necessary to secure the loan, and for failure to do this he should not complain because of the sheriff's deed. But we think it fairly appears that the negotiations for a loan were not at an end when the sheriff's deed was made. The plaintiff's note and mortgage were in the hands of Lombard. The mortgage was recorded and was an apparent lien upon the land which no doubt would have prevented the procuring of a loan elsewhere. It is true Lombard procured a release of the mortgage and canceled the note but not until sometime after he had procured the sheriff's deed. He occupies this position: While acting as the agent of the plaintiff in procuring a loan he procured a mortgage placed it upon record and then caused the title of the land to be conveyed to B. Lombard. He cannot be allowed while thus acting as the agent of the plaintiff to take advantage of him. Good faith required that before taking the title he should have procured the cancellation of the mortgage and placed the plaintiff in *statu quo*. It is said that it is customary with loan agents to place the mortgage upon record at once, and before the liens which it is given to extinguish are paid, so as to prevent intervening liens. If this is a custom it ought also to be a custom to release the mortgage where the loan for any reason fails of completion, and such release should be promptly made and no advantage should be taken of the debtor by reason of the negotiations, while the mortgage remains as an apparent lien upon his land. *

The decree of the Circuit Court as it appears in the abstract is not as explicit as seems to us desirable in the matter pertaining to the rights of the parties to liens upon the land. The sheriff's deed was properly set aside. This leaves the parties in the same situation they were in before there were any nego-

Giddings v. Giddings.

tiations for a loan, except that without some order in the premises the defendant would be entitled to a deed at once. Under the circumstances we think the proper decree would be, that the plaintiff have sixty days from the filing of this opinion for redemption, and to pay off the liens upon the land, and if he fails to do so the rights of the parties to be the same as if there had been no negotiations for a loan.

AFFIRMED.

GIDDINGS v. GIDDINGS.

1. **Amendment: PRESUMPTION.** Where the transcript shows an amendment to the petition by interlineation conforming it to the proof, but fails to show when the same was made, it will be presumed it was made at the time the testimony was introduced, and by leave of court.
2. **Evidence: EXCLUSION OF.** Evidence as to the ability of the plaintiff to pay a note, set up as a cross-demand, at any time after the execution, is remote and was properly excluded.
3. ———: **PRACTICE.** The evidence as to the validity of the note and mortgage, set up as cross-demand being in conflict, the findings of the court will not be interfered with.

Appeal from Linn District Court.

MONDAY, DECEMBER 12,

ACTION upon a promissory note, and upon an accepted order. There was a cross-demand by which the defendant claimed judgment against the plaintiff upon a promissory note. A jury was waived and upon a trial by the court judgment was rendered for the plaintiff. Defendant appeals.

F. C. Hormel and J. C. Leonard, for appellant.

H. G. Bowman and B. F. Hines, for appellee.

ROTHROCK, J.—I. The judgment entry is as follows: "And now, to-wit: April 29, 1881, this cause comes on for the judgment of the court, the same having been heretofore taken

Giddings v. Giddings.

under advisement, and the court being fully advised and satisfied in the premises, it is therefore considered and judged that the plaintiff herein have and recover of and from the defendant judgment for the sum of — — dollars, together with interest thereon at the rate of — — per cent per annum, and the further sum of \$33.65, taxed as costs of this proceeding.

* * * * *

It is urged by counsel for appellant that the judgment should be reversed because it is indefinite and uncertain. It is certain that the only amount enforceable under the judgment as it now stands, without correction, is the amount of costs taxed against defendant. The plaintiff does not complain of the informality of the judgment. He has taken no appeal therefrom. Counsel for the respective parties have argued the question as to the proper method of correcting a judgment of this character, and whether or not any correction thereof can be made. These questions are not presented by the record before us. They are matters we cannot consider. The court evidently intended, as appears by the special finding, to render judgment for plaintiff for the amount of the note and order. What the plaintiff's remedy is we are not called upon to determine.

II. The accepted order upon which the action was in part founded was described in the petition as having been drawn by one *Enoch P. Vandike*. Upon the trial when the plaintiff offered the order in evidence it appeared to be drawn by *Enoch P. Updike*. Objection was made to the introduction of the order as evidence, which objection is appears was overruled. The appellee insists that when the objection was made the mistake in the petition was corrected by amendment. Appellant contends that no amendment was made. The transcript shows that the word Updike was interlined in the petition at the proper places. At what time this interlineation was made does not appear. The presumption will be indulged that it was made when the objection to the intro

1. AMEND-
MENT: pre-
sumption.

Giddings v. Giddings.

duction of the order as evidence was interposed, and that the amendment was thus made by leave of the court.

III. The cross-claim was based upon a promissory note for \$600, made in the year 1870 and due in one year, with interest at 10 per cent per annum. It was secured by a mortgage upon chattel property. The plaintiff claimed that the note and mortgage were without consideration and given to protect the plaintiff against a certain claim of a creditor which was likely to be enforced against him. The court, in certain special findings of fact, found that the plaintiff's claim as to the validity of the note and mortgage was correct.

In the course of the examination of the defendant as a witness, his counsel asked him whether the plaintiff had been at any time since the execution of the note, in such a condition that the note could have been collected. An objection to this question was sustained, and this ruling of the court is assigned as error. It appears to us that the plaintiff's ability to pay was a very remote question in the case. It may be it would, in some slight degree, serve to explain the defendant's delay in enforcing the note, and rebut such inference of its invalidity as might arise from delay in its collection. But the defendant was permitted to state that the plaintiff had been insolvent eight or ten years. This was certainly sufficient upon that point.

IV. It is claimed the judgment against the defendant is without support in the evidence, and counsel in argument contend that upon the evidence there should have been a judgment for the defendant on the cross-claims. The evidence as to the validity of the note and mortgage was in conflict, and the finding of the court against the defendant is sufficiently supported to preclude our interference.

AFFIRMED.

Bradley v. Gelkinson.

BRADLEY V. GELKINSON.

1. **Mortgage: OF CROPS TO BE GROWN: PRIORITY OF.** Where two mortgages are given upon certain crops to be grown, they are entitled to precedence in the order of their execution and recording, although the second mortgage was given for the purchase-price of the seed from which the crops were to be grown.
2. —: —: **ESTOPPEL.** The fact that the first mortgagee, knowing that the second mortgagee had taken possession of the crop, made no claim thereto until the same was harvested and threshed, would not estop him from asserting his claim.

Appeal from Osceola Circuit Court.

MONDAY, DECEMBER 12.

THE plaintiff brings this action to recover of the defendant damages for the alleged conversion of certain property which the plaintiff claims as the assignee of a chattel mortgage executed on the 17th day of November, 1877, by James Heatham to William D. Bradley to secure a promissory note of the same date for the sum of \$84.20, payable October 1, 1878. The property mortgaged is described as follows: "All the crop raised or grown on the north $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 20 township 98, range 41, in the year 1878; said crop to consist of wheat, oats, flax, barley, corn, and rape seed, in all about 70 acres."

The defendant filed an answer substantially as follows:

First. Denies that the note and mortgage set out in plaintiff's petition were assigned to him before due.

Second. Denies that he wrongfully entered upon the premises of James Heatham and wrongfully took possession of the grain described in the petition.

Third. Alleges that on the 9th day of March, 1878, he sold to James Heatham fifty bushels of wheat, ten bushels of flax, twenty bushels of barley, and thirty bushels of oats, for the sum of \$92, for which sum James Heatham executed his

Bradley v. Gelkinson.

promissory note, secured by a chattel mortgage on the above described grain, then in said Heatham's bin on the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 20, township 93, range 41. Said chattel mortgage authorized said James Heatham to sow the grain therein described on the above described land and the increase and crops raised from said seed was to be held and covered by said mortgage. That the said James Heatham did sow the above described grain on the above described land, in the spring of 1878, and that the wheat, flax, barley, and oats described in defendant's mortgage were the only wheat, flax, barley, and oats sown and planted on the above described land in the season of 1878.

Fourth. That plaintiff was present when the defendant took possession of the grain described in the petition, and knew that defendant was taking possession of, and threshing, and disposing of it under a lien that he claimed to have upon it, and plaintiff made no claim to it, and asserted no interest in it, and defendant had no knowledge that he had or claimed any interest in it until after it was threshed and disposed of, and hence plaintiff is estopped from asserting any claim thereto.

Fifth. That, in the fall of 1878, all of said crops were very poor and short. That said Heatham commenced to thresh them, and found they would not pay for handling and threshing, and notified this defendant that he would have nothing further to do with the crops, and that if they were threshed, this defendant would have to do it. This defendant thereupon took possession of the wheat, flax, and oats grown on said above described lands from above described seed, and none other, by his agent, J. H. Douglas, sheriff of Osceola county, and proceeded to thresh and care for the same; that said wheat threshed out, when cleaned, one hundred and ninety-four bushels; said flax, forty-three bushels, and said oats, one hundred and sixty bushels; that this defendant realized from the sale of said wheat the sum of \$62.05; from the sale of said

Bradley v. Gelkinson.

flax, the sum of \$29.03; and from the sale of said oats, \$2 which was the highest market price they would bring; the total expense in taking possession of, threshing, and marketing said grain was \$77.95, leaving a balance only \$23.13 in defendant's hands to apply on the debt due him. The mortgage under which the defendant claims, a copy of which is attached as an exhibit, is dated March 9, 1878, and describes the mortgaged property as follows: "Fifty bushels of wheat now in my bin, on the north half, of the southeast quarter, section twenty, township ninety-eight, range forty-one. Said wheat to be sown on said place, and this mortgage to cover all the wheat grown from said wheat. Ten bushels of flax-seed in said bin, to be sown on same land, and this mortgage to cover all the flax grown from said seed; twenty bushels of barley in said bin, to be sown on said land, and this mortgage to cover all the barley grown from said seed; and thirty bushels of oats in same bin, to be sown on same land, and this mortgage to cover all the oats grown from said seed upon said land."

The plaintiff demurred to the several counts of the defendant's answer, on the ground that the facts stated constitute a defense. This demurrer was overruled.

The plaintiff elected to stand upon his demurrer, and judgment was rendered against him for costs. The plaintiff appealed.

Barrett & Butler, for the appellant.

No argument for appellee.

DAY, J.—I. The mortgage under which the plaintiff claims was executed November 17, 1877, and was recorded February 18, 1878. The mortgage under which defendant claims was executed March 9, 1878. Both mortgages are upon the crops to be grown upon the same land the year, 1878. No question is made as to the validity of either mortgage, the only question involved in relation to the

L. MORTGAGE:
of crops:
priority of.

 Bradley v. Gelkinson.

being as to which is paramount. The mortgage under which the plaintiff claims was executed and recorded before the defendant's mortgage was executed. The defendant's mortgage is upon certain wheat, flax, barley, and oats in the bin of Heatham, but the mortgage provides that the specific property mortgaged shall be sown, and the mortgage shall attach to the crops grown therefrom. The only theory upon which the defendant's mortgage can have precedence, is that it was given to secure the price of the seed from which the crop was grown. We think, however, that the consideration for which the mortgages were given is immaterial. The mortgages are entitled to precedence in the order of their execution and recording. The mortgage under which plaintiff claims was on record when that of the defendant was executed and whatever rights the defendant acquired are subject to the superior claim of plaintiff.

II. The facts alleged in the fourth count of the answer do not constitute an estoppel. The defendant, under his mortgage, had a right to take possession of the grain, and pay off the plaintiff's superior lien, and apply the balance to his own claim. The plaintiff had a right to suppose that defendant had knowledge of the mortgage under which plaintiff claims, which was upon record, and that he was taking possession of the crops subject to the plaintiff's mortgage. The mere fact that he did not assert his claim does not estop him to do so now.

III. The facts alleged in the fifth count of the answer are pleaded as a complete defense. That they do not constitute a complete defense is apparent from what has already been said.

Whether the defendant would be entitled to a reasonable compensation for harvesting and taking care of the crops, and would be responsible only for the sum realized by the employment of reasonable care and diligence, is a question which this appeal does not present, and which we do not determine.

REVERSED.

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TUTTLE V. WHEATON ET AL.

1. **Attachment: RELEASE OF: INTERVENTION.** A third person claiming ownership of personal property, attached in a suit to which he is not a party, who has recovered actual possession of the property, under sections 2996, 2997, Code, may intervene in the attachment suit, by virtue of section 3016, Code, and have his rights to the property adjudicated.

Appeal from Hancock District Court.

MONDAY, DECEMBER 12.

On the 8th day of October, 1880, the plaintiff commenced an action by attachment against the defendants, J. and H. Wheaton, to recover the sum of \$60. On the 17th day of January, 1881, the sheriff made return to the clerk of the court, of a writ of attachment showing that he had levied the same on twenty-two stacks of hay, and that the intervenors Burnside Bros., had filed with him their affidavit and bond as provided by section 2996, Code of 1873, and that thereupon he released and discharged the attached property. On the 19th day of January, Burnside Bros. filed in said cause their petition of intervention, claiming that they are the owners of the hay levied upon, in virtue of a purchase thereof from the defendants. The plaintiff filed an answer to the petition of intervention alleging that intervenors, before filing their petition of intervention, gave a delivery bond for the attached property, and thus secured the release of the attached property and the delivery thereof to them, wherefore plaintiff submitted that the petition of intervention should be dismissed. The intervenors filed a motion to strike said answer from the file, which was overruled, but it was agreed by counsel that it might be treated as a demurrer to the answer. The demurrer was thereupon sustained, and judgment was rendered against plaintiff in favor of the intervenors. The plaintiff appeals.

 Tuttle v. Wheaton.

O'Connell & Springer, for the appellant.

F. M. Goodykuntz and *A. C. Ripley*, for the appellee.

DAY, J.—The interest which the plaintiff claims in the property, being less than one hundred dollars, the court has certified the questions upon which it is desirable to have the opinion of this court, as follows:

1. "Can a third person, not a party to a suit in which an attachment has been issued and levied on personal property, intervene in such action claiming a judgment for the possession of the attached property, after he has recovered and holds actual possession thereof by virtue of the provisions of section 2996 and 2997 of the Code of 1873, by giving bonds?

2. "Can a third person claiming ownership of personal property attached in a suit to which he is not a party, after he has recovered and holds actual possession of the attached property under and in pursuance of the provisions of sections 2996 and 2997, Code of 1873, apply to the court in such attachment suit and have his rights to such attached property adjudicated under section 3016, Code, 1873 or otherwise?" Sections 2996 and 2997 of the Code, simply provide a means whereby a person claiming an interest in attached property may secure a discharge of the property attached. In order to do this he must give a bond conditioned that the property or its estimated value shall be delivered to the sheriff to satisfy any judgment which may be recovered against the defendant. The sections do not contemplate an ultimate and final release of the attachment, but that the property itself or its value shall be returned to the sheriff. It is true the party effecting the release may violate the conditions of his bond, refuse to return the property, and subject himself to an action upon the bond, in defense of which he may show that the property did not belong to the attachment defendant. But, we are of the opinion that he is not limited to this course. Section 3016, of the Code provides:

Tuttle v. Wheaton.

"Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may impanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party at the discretion of the court." This statute is very broad and general in its terms. It provides a remedy for any person other than the defendant before the sale of any attached property. The property in question was attached property, although temporarily discharged by the giving of a bond.

To hold that the property in question ceased to be attached property in the sense in which the word is employed in section 3016, upon the execution by the intervenors of a bond, conditioned for the delivery of the property, or its value to the sheriff to satisfy any judgment which might be recovered, would be to place an exceedingly narrow and technical construction upon the provisions of that section. In our opinion the second question certified by the court must be answered in the affirmative. The first question is not material to the determination of the rights of the parties, and is not pertinent to the issue, as the intervenors did not claim a judgment for the possession of the attached property, but they ask that they be adjudged to be the owners of the attached property, which was already in their possession. The judgment of the court below is

AFFIRMED.

UNIVERSITY OF DES MOINES v. LIVINGSTON.

1. **Practice in the Supreme Court: ASSIGNMENT OF ERRORS.** Where the assignment of errors, although informal, works no prejudice the appeal will not be dismissed.
2. **Subscription: CONSIDERATION FOR.** A subscription for the purpose of paying off a debt already incurred, and where no new liability or obligation was assumed upon the faith of the same, is without consideration, and cannot be enforced.
3. —: —: **EVIDENCE OF IMPROVEMENTS.** Evidence of raising money and of making improvements which, if done in consequence of, and relying upon the subscription in question, would constitute a consideration sufficient to support the subscription, was improperly excluded from the jury in this case.

Appeal from Marion Circuit Court.

MONDAY, DECEMBER 12.

AN action to recover of the estate of T. C. Livingston, deceased, \$731, on account of a subscription of \$500 to the University of Des Moines. Under the direction of the court the jury returned a verdict for the defendant. The plaintiff appeals. The facts are stated in the opinion.

Cole & Cole, for the appellant.

Bryan & Bryan, for the appellee.

DAY, J.—I. The cause was submitted on the 10th day of June, 1881, with a motion of the appellee to dismiss the appeal, because no assignment of errors has been filed in the cause with the clerk of the court nor served on the appellee or his attorneys, ten days before the first day of the trial term, or at any other time. The argument of the appellant was served upon the attorneys of the appellee November 15, and it was filed with the clerk November 16, 1880, six and one-half months before the time at which the cause was submitted. At the conclusion of appellant's argu-

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92	652

57	307
95	496

57	307
118	638

57	307
139	246

University of Des Moines v. Livingston.

ment the following is found: "In conclusion we submit
* * * that the lower court erred in the two rulings to
which appellant excepted:

"First. In excluding the evidence of work done and ex-
penses incurred on the strength of the subscriptions, and

"Second in taking the case from the jury when there was
evidence tending to show that the subscription was not with-
out consideration."

If this statement had preceded the argument, there can be
no doubt that it would have constituted a sufficient assignment
of error. The appellee filed a lengthy argument, in which the
position of the appellant that the court erred in the above par-
ticulars is elaborately discussed. To this the plaintiff filed a
reply. No question was made as to the assignment of error
until the 8th of June, two days before the cause was submit-
ted. Under the circumstances the appellee has been in no
way prejudiced because the assignment of errors did not pre-
cede the argument, and the assignment was not made in a
more formal manner. In our opinion, the motion to dismis-
s the appeal should be overruled.

II. The subscription paper is as follows: "For and in con-
sideration of securing to the Baptist denomination of Iowa the
property situate in Des Moines, and known as the
University of Des Moines, we, the undersigned
hereby bind ourselves individually to pay the sum
set opposite our names, when in the aggregate ten thousand
dollars is so secured; provided the said amount is pledged by
August 1, 1870. Grinnell, March 20, 1869." To this paper
the deceased, T. C. Livingston, subscribed \$500. Before the
last of July, 1869, the subscription amounted to about \$12,700.
The University of Des Moines is located in the city of De-
 Moines, and at the time of this subscription was under mor-
gage amounting, in January, 1869, to \$9,000, and maturing
the next year. The trustees of the institution purchased the
property from the Lutheran denomination in the year 186

2. SUBSCRIP-
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and the sole purpose of the subscriptions was to meet the indebtedness, and secure the college to the Baptist denomination. After the testimony had all been introduced the defendant moved the court to direct the jury to return a verdict for the defendant for the reasons following, to-wit: "The evidence shows without conflict that the contract or subscription upon which the plaintiff claims to recover in this action was for the sole purpose of raising money to pay off an indebtedness theretofore contracted by plaintiff, and existing against it before the defendant's decedent, or any other person subscribed thereto; and that the gift promised by defendant's decedent was for that express purpose, and the said promise, donation, and subscription are without consideration and cannot be enforced." The court sustained this motion, and directed the jury to find for the defendant. To this action the plaintiff excepted.

A written contract imports a consideration. It is, however, competent to show a failure of consideration to defeat an action upon the contract, the burden of proof being upon the defendant. The question involved in this case is, whether the proof shows without conflict that the subscription sued upon was without consideration. In *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass., 528, which is comparatively a recent case, and which contains the latest utterance of the Supreme Court of Massachusetts upon the question of subscriptions, the following language is employed: "The performance of guaranteed promises depends wholly upon the good will which prompted them, and will not be enforced by the law. The general rule is that in order to support an action the promise must have been made upon a legal consideration moving from the promisee to the promisor. *Exchange Bank v. Rice*, 107 Mass., 37. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble, or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made."

In this case most of the Massachusetts cases cited by appellant's counsel are referred to, and it is declared that, "in every case in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown either by express vote or contract assuming a liability or obligation, legal or equitable, or else by some unequivocal act; such as advancing or expending money, or erecting a building in accordance with the terms of the contract, and upon the faith of the defendant's promise." In this case the plaintiff did not enter into any undertaking on account of the subscription in suit. The college building had been purchased, and the debt in question had been contracted before that time. The plaintiff did not even obligate itself to raise the sum of \$10,000. The case is in principle very like *Stewart v. Trustees of Hamilton College*, 2 Denio, 403; same case, 1 N. Y., 581, in which it was held there could be no recovery. See *Limerick Academy v. Davis*, 11 Mass., 113. In most of the authorities cited by appellant it will be found that the promisee entered into some undertaking, assumed some liability, or made some promise upon the faith of the subscription sought to be enforced. Nothing of the kind was done in this case. In our opinion the court did not err in directing a verdict for the defendant, upon the proof admitted.

III. J. F. Childs, upon being recalled as a witness for the plaintiff, testified as follows: "I reported that first subscription, and the way it stood, about \$13,000, to a large meeting of the board of trustees, and by direction of the trustees, I went to work and obtained \$3,000 in money, and put a cupola on the college building, and made some other improvements." Upon motion of the defendant, this evidence was excluded from the jury. This action of the court is assigned as error. Although the witness does not in terms testify that he was directed to raise the \$3,000, and put a cupola upon the building and make the other improvements, because a subscription had

3. —: —: evidence of improvements.

University of Des Moines v. Livingston.

been obtained to relieve the institution of its debt; still we think that if a jury should find the fact to be so from what the witness does state, we would not feel ourselves called upon to set aside such verdict as wanting support from the testimony. If the plaintiff, in consequence of, and relying upon, the subscription in question, incurred the expense and trouble of raising an additional \$3,000, and of expending it in improvements upon the college building, this would, under the authorities, constitute a consideration sufficient to support the subscription. See *Thompson v. Paige*, 1 Met, 565; *University of Vermont v. Buell*, 2 Vt., 48; *Ladies' Collegiate Institute v. French*, 16 Gray, 196; *Trustees Amherst College v. Cowles*, 6 Pick, 427; *Trustees Williams College v. Danforth*, 12 Pick, 541; *Watkins v. Eames*, 9 Cush., 537; *Merick v. French*, 2 Gray 420; *McAuley v. Billinger*, 20 Johns, 89; *Barnes v. Perine*, 18 N. Y., 18; *Pitt v. Gentle*, 49 Mo., 74; *Caul v. Gibson*, 3 Penn. St., 416; *Methodist Church v. Garvey*, 53 Ill., 401; *Robertson v. March*, 3 Scamm., 198; *Simpson Centenary College v. Bryan*, 50 Iowa, 293.

The appellee insists that this evidence was properly excluded because not pertinent to any issue in the case. The written subscription imports a consideration, and hence it was not necessary for the plaintiff in its petition to aver that it was founded upon a consideration. It was incumbent upon the defendant to aver the want of consideration. This the defendant did in these words: "Denies any consideration whatever, and states that at the time the contract set out was signed by decedent the Des Moines University was indebted in about the sum of \$9,000, and that the subscription was obtained solely for the purpose of paying said indebtedness; that decedent never received any benefit, advantage, or consideration for said promise, either directly or indirectly, nor the claimant any detriment in any way by reason thereof, and, therefore, said subscription was without consideration and void and that neither decedent nor his estate is liable thereon."

Noyes v. Harrison County.

The appellant claims that without a reply in the nature of a confession and avoidance the proffered evidence is inadmissible. Section 2665 of the Code provides: "There shall be no reply except: 1. Where a counter-claim is alleged; or, 2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense, by reason of the existence of some fact which avoided the matter alleged in the answer." Now it is evident that the plaintiff does not seek to avoid the allegation of the answer that the plaintiff had sustained no detriment on account of the subscription, but to disprove it. No reply, therefore, was required, or was proper. The allegations of the answer are deemed denied. *Cassidy v. Caton*, 47 Iowa, 22. In our opinion, the court erred in excluding this evidence from the jury, and for this reason the judgment is

REVERSED.

BECK, J., took no part in the determination of this case.

NOYES ET AL. V. HARRISON COUNTY ET AL.

1. **Board of Supervisors: CONSTRUCTION OF DITCH: INJUNCTION**
Where the petitioners for the construction of a ditch, join in an action to restrain the collection of the tax levied upon their property to reimburse the county therefor, the action of the board of supervisors in paying more for such construction than the original estimates and specifications called for, in the absence of fraud, will not be reviewed; and after the county has paid for the ditch, so constructed, the objection that the work was not done in accordance with the specifications, comes too late.

Appeal from Harrison District Court.

MONDAY, DECEMBER 12.

THE plaintiffs presented a petition to the board of supervisors asking the location and construction of a ditch. The county surveyor was appointed to make the necessary survey, plans and specifications, and after due notice the ditch was or-

 Noyes v. Harrison County.

dered constructed and a contract was let therefor in accordance with the plans and specifications. The contractor was paid the contract price by the county, a tax levied upon the property of the plaintiffs to reimburse the county, and this action brought to restrain the collection of the tax. A decree was entered dismissing the petition, and the plaintiffs appeal.

S. H. Cochran, for appellants.

S. J. King, for appellees.

SEEVERS, J.—The grounds upon which relief is asked, in substance are, that the ditch was not constructed in accordance with the plans and specifications, and that the board of supervisors fraudulently and negligently paid for more work than was actually done or was required to be done according to the specifications. The claim being the amount of excavation according to the specifications was only about two thousand cubic yards, while the board paid for upwards of five thousand yards.

The county surveyor made a report to the board of the number of cubic yards excavated, and the board after examining the ditch, determined it had been completed in accordance with the contract, and paid the contractor for the amount of earth excavated as shown by the report of the surveyor. Under such circumstances in the absence of fraud the action of the board cannot be reviewed in this proceeding. *Patterson v. Baumer*, 43 Iowa, 477.

There is not a particle of evidence tending to show fraud or collusion on the part of the board, unless the fact that the amount of excavation paid for exceeded that called for by the specifications is sufficient to establish such proposition. We do not think it is. It must be remembered the county surveyor reported the amount of excavation actually done, and there is no evidence showing he thereby perpetrated a fraud. It is not to be presumed the board had the requisite knowledge to

Harrison v. Owens.

enable them to determine the amount of excavation. They were not even guilty of negligence in relying on the report of the county surveyor, much less of fraud.

This ditch was constructed at the instance of the plaintiffs, and they knew they were bound to pay therefor, and yet they took no steps to inform themselves as to whether it had been properly constructed in accordance with the specifications until it was paid for by the county. The result of their present action if successful would be to shift the burden from themselves upon all the tax payers of the county. We think the objection now made in the absence of fraud comes too late.

AFFIRMED.

HARRISON V. OWENS.

1. **Tax Sale: REDEMPTION: EQUITIES.** A party will not be allowed to redeem lands from tax sale after the expiration of the statutory period for redemption, unless the evidence shows strong equities entitling him to relief.

Appeal from Palo Alto District Court.

MONDAY, DECEMBER 12.

THE plaintiff claims to be the owner of certain lands in his petition described, by virtue of certain tax deeds executed on the 29th day of October, 1877, pursuant to a sale made October 5, 1874, for a delinquent tax of 1873, and brings this action to quiet his title to said lands. The defendant, John E. Owens, claims to be the patent title owner of said land, and by way of answer and cross-bills, amongst other things, alleges certain facts which he claims entitle him to redeem from the tax sale.

The cause was tried upon written evidence, and a decree was entered quieting plaintiff's title, and dismissing defendants

Harrison v. Owens.

cross-bill. The defendant appeals. The facts are stated in the opinion.

Chase & Cooil, for the appellant.

Harrison & McCarty, for appellee.

DAY, J.—The plaintiff objected to certain evidence which was introduced to prove that the defendant was the patent title owner of the land in controversy, and now insists upon its insufficiency to establish that fact. In the view which we take of the case this question needs not to be considered.

The only ground upon which the defendant in the argument claims to be entitled to relief is that he made such efforts to
1. TAX SALE: redeem before the execution of the deed, as now
redemption: redemption:
equities. in equity entitle him to redeem. Upon this point there is some conflict in the evidence, but the facts established by the preponderance of the evidence are as follows: The lands in controversy are situated in Palo Alto county. Due notice of the expiration of the period of redemption was given by publication, and the notice and proof of service thereof were duly filed in the treasurer's office July 25, 1877. The period of redemption expired on the 23d day of October, 1877. On the 27th day of September, 1877, the defendant John E. Owens, went to Emmetsburg for the purpose of redeeming these lands, arriving there about noon, and remaining till about half past four.

He immediately went to the office of Shea & Brown, bankers and real estate agents, and informed Mr. Brown, a member of the firm, who was also county treasurer, that he had come to redeem his lands. He was shown by Mr. Brown the notice to redeem, and was informed of the time when the period for redemption would expire. During his stay at Emmetsburg, he went three times to the auditor's office for the purpose of redeeming, and at each time he found the office locked, although the auditor was in his office at some time

Harrison v. Owens.

during that day. He then returned to the office of Shea & Brown, and left with them \$500 to be applied on the redemption of his lands, and took their receipt therefor. He did not, however, authorize them to effect redemption of the lands in question, but informed them that he would himself return and attend to the matter in person. On the 24th day of October, 1877, the defendant wrote Messrs. Shea & Brown from Webster City, stating that he had been sick and could not attend to the matter sooner, and authorizing them to redeem all the lands in question. On receipt of his letter on the 26th day of October, 1877, Brown went to the auditor's office to redeem, but the auditor would not allow redemption, on the ground that the time therefor had expired. These facts, in our opinion, do not entitle the defendant to relief. Twenty-six days for redeeming remained after the day that the defendant went to the auditor's office to redeem. He was not excused from making any further effort to redeem simply on account of the fact that he went there. The \$500 were not left with Brown as treasurer, but with the firm of Shea & Brown, and their receipt taken therefor. They were informed that the defendant would return in time to effect the redemption in person, and they were not authorized to use the money for the purpose of redeeming, until after the period for redeeming had expired. The case, in its equities, falls very far short of the cases in this court in which relief has been granted on account of the ineffectual effort to redeem. In our opinion, the decree of the court is right.

AFFIRMED.

JONES V. FIELDS ET AL.

1. **Bond: CONDITIONS OF: LIABILITY OF SURETY UNDER.** Where one member of a partnership pleaded certain claims due the partnership as a set-off in an action against him individually, and executed a bond with surety, "to account for the whole proceeds of said claims," it was held that the bond bound the obligors to pay the entire amount of such claims, although a portion of them might have been paid to the principal before the bond was executed; and that the dismissal of an action to settle the partnership would not release the surety.

Appeal from Adams Circuit Court.

MONDAY, DECEMBER 12.

ACTION on a bond executed by defendant Fields, and Meyerhoff as his surety. Judgment against both of the defendants, but Meyerhoff alone appeals.

Davis, Wells and Russell, for appellant.

W. O. Mitchell and A. M. Waters, for appellee.

SEEVERS, J.—Perhaps, because it could not be well avoided, this cause, as it appears to each member of the court, has been presented in a singularly confused manner. The action, originally, was brought on a bond executed by the defendants. By an amended or supplemental petition it was shown the plaintiff and Fields had been partners, and it was sought to settle the partnership accounts between the partners. Why this action was joined with the former we are at a loss to know. We are also at a loss to know why there was anything set forth in the abstract in relation to the action to settle the partnership, because there was but a single judgment or determination made, and Meyerhoff alone appeals, and he was not a proper party and had no interest in the action to adjust the partnership.

We understand this appeal to relate solely to the action on the

 Jones v. Fields.

bond. Rejecting what we regard as surplusage in the record, we understand the material facts to be: That the plaintiff and Fields were partners, and that one Kennedy, as is claimed, became indebted to the partnership in the sum of seven hundred and seven dollars. The defendant Fields was indebted to Kennedy, and the latter brought an action against the former, based on such indebtedness, in which Fields by way of counter-claim pleaded the partnership indebtedness against Kennedy, and asked to recover thereon against him. The plaintiff intervened in said action and denied the right of Fields to so plead or recover on the amount due the partnership by Kennedy. Thereupon it was agreed between the plaintiff and Fields that the former should dismiss his petition of intervention and allow Fields to set up the amount due from Kennedy, as aforesaid, in the action brought by him against Fields. In consideration thereof, Fields agreed to, and did, with Meyerhoff as his surety, execute the bond sued on. The bond was given to one Fisher as receiver of the partnership. To the counter-claim of Fields, Kennedy pleaded several defenses, and upon a trial of the issues Kennedy recovered a less amount than he claimed.

The bond recited at some length the circumstances under which it was given, and was conditioned as follows: "Now if the said Fields shall well and faithfully prosecute said claims against said Kennedy and shall promptly account for the whole proceeds of said claims to said Fisher, to be applied upon the valid existing indebtedness of the said firm of Fields & Jones, or in case said Jones shall have paid the debts of the said firm, the said sums to be paid by said receiver to said Jones * * then this bond to be void, otherwise in force."

Fisher, before the commencement of this action, was discharged as receiver and the plaintiff claims to recover on the bond because he has paid the debts of the partnership as there-in contemplated. The foregoing statement is sufficient, we

Jones v. Fields.

think, to a full understanding of the objections urged to the action of the court which we deem essential to be considered.

It is said this is an equitable action and triable anew in this court. We think this exceedingly doubtful, but as appellee does not claim otherwise, it will be so regarded. It is said that the burden is on the plaintiff and he must show how much was allowed Fields in the action brought by Kennedy on the partnership claims. But the condition of the bond is that Fields "shall promptly account for the whole proceeds of said claims." That is to say, Fields agreed, if allowed to plead the amount due the partnership by Kennedy as a counter-claim in the action brought by Kennedy against Fields, the latter would account for, that is, pay, the amount of such claims to the partnership for the use of the plaintiff, if in the meantime the latter had paid the partnership indebtedness. Fields assumed the risk that he would recover on said claims. As Kennedy did not object that the claims could not be litigated in that action, there was in fact no risk assumed if Kennedy was indebted in the amount claimed, and whether this was true or not Fields had as much knowledge as the plaintiff. We are therefore of the opinion the defendants bound themselves absolutely to pay the amount of the claims against Kennedy, to and for the use of the partnership.

We have also looked into the evidence and think the preponderance is with the plaintiff that Fields was allowed in the Kennedy action on said claims at least the amount found by the court. Kennedy testified that he was indebted to the partnership in the amount claimed by Fields, and that he so testified in the action brought by him. It must therefore follow that Fields received in some way credit for the amount of said claims. It is true that Kennedy testified he had paid Fields all or a portion of such amount before the bond was given. But we do not think this material, for, as we have seen, the defendants bound themselves to account for the whole

 Roberts v. Deeds.

amount without regard to the time when the claims may have been paid to Fields by Kennedy.

It is urged that Meyerhoff was released because the action to settle the partnership was dismissed by the plaintiff. We are unable to see that the liability under the bond depended to any extent whatever upon the disposition of said action.

AFFIRMED.

ROBERTS V. DEEDS ET AL.

1. **Tax Deed : DESCRIPTION : UNCERTAINTY OF.** Where the description of the property in the tax books and tax deed was not sufficiently certain to identify the land and to enable a surveyor to locate it the tax deed will be void, and the defect in the description cannot be cured by extraneous evidence.
2. — : — : **SALE INVALID.** The defect in the description would invalidate a sale made to enforce a lien for the taxes upon personal property, as well as a sale for the taxes upon the land itself.
3. — : — : **TAXES PAID BY PURCHASER : RECOVERY OF.** Where the tax sale and deed transferred no interest in the land in question, for the reason that there was no description of the property in any of the proceedings, the purchaser cannot recover the amount of taxes paid by him.

Appeal from Washington District Court.

MONDAY, DECEMBER 12.

ACTION to quiet the title of certain land in plaintiff, and to recover the possession thereof. There was a decree granting the relief sought in plaintiff's petition; defendants appeal.

John W. Templin, for appellants.

Jackson Roberts, appellee, *pro se.*

BECK, J.—The title of plaintiff under which he seeks to recover the land in question is based upon a sale for taxes and a

57	320
81	86
87	330
84	459
57	320
92	102
57	320
105	477
57	320
118	451
57	320
118	677
57	320
137	271

Roberts v. Deeds.

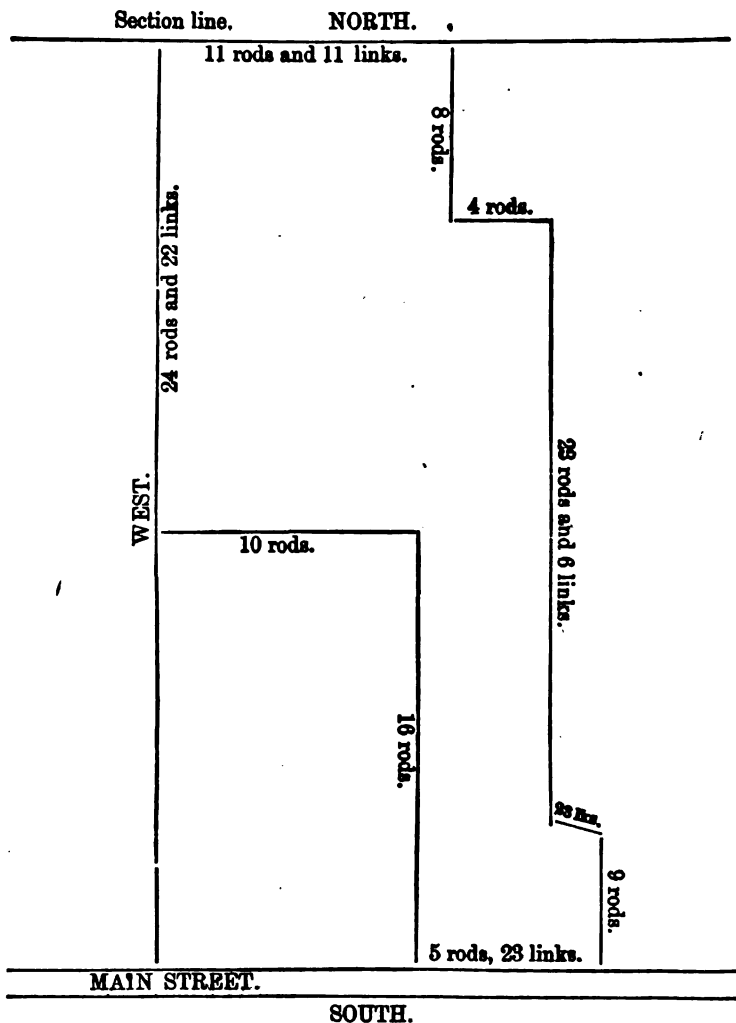
deed executed by the treasurer thereon. The land is described in the original petition as the "N. W. part of N. E. N. E., section 31, township 74, range 8 west, containing three acres." The pleadings and proof show that the land was assessed to Edward Deeds, and listed for taxation by this description, which is the only description of the property found in the tax-books. The taxes levied upon the land itself were paid. The tax sale was for delinquent taxes levied upon personal property assessed to Edward Deeds. The land in question was occupied by defendants, who are husband and wife, as their homestead, but it was never platted as such. Its true description is as follows:

"Commencing at the northwest corner of the northeast quarter of the northeast quarter of section thirty-one (31), in township number seventy-four (74), north of range number eight (8) west, thence running east eleven rods and eleven links, thence south eight rods, thence east four rods, thence south twenty-three rods and six links, thence in a southeast direction about fifteen feet to lands owned by Jas. H. Auld, thence south on said Jas. H. Auld's west line nine rods to the north side of Main street in the town of Brighton, thence west along the north side of said Main street five rods and eleven links and eight feet, thence north sixteen rods, thence west ten rods, thence north about twenty-five rods to the place of beginning."

The following plat, made an exhibit by plaintiff, shows at a glance the part of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 31, township 74 N., R. 8 W., owned by Deeds, which plaintiff claims is covered by the description as found in the assessment and tax books, and also in the treasurer's deed executed upon the tax sale:

Roberts v. Deeds.

EXHIBIT "A" TO PLAINTIFF'S AMENDED PETITION.



It will be observed that the area of the land as shown by the true description is less than three acres, the quantity called for by the description used in the tax books and treas-

Roberts v. Deeds.

urer's deed. Deeds owned no other land in the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 31.

II. The decisive question in this case is this: Is the description used in the tax books and deed sufficient to identify the land owned by Deeds? We are of opinion that it does not. It describes the land as being the "N. W. part" of the "forty," but the land extends across the whole "forty," and a part of it does not lie upon the west line thereof. It cannot therefore be described as "N. W. part" of the "forty." The description does not indicate the figure of the land. An indefinite number of tracts of three acres could be surveyed, each of which would be the N. W. part of the "forty." Yet the tract owned by defendants could not be covered by any one of such surveys for it in truth is not the "N. W. part." A surveyor could not with the description before him even approximately locate the land. The description is therefore void for uncertainty. It cannot be recognized by the law, for the simple reason that it is no description at all. It contains no data from which the locality of the land can be discovered. Familiar rules of law hold as void all instruments affecting real estate wherein the descriptions are of this character. These rules apply to assessments of taxes, and sales thereon, and to deeds for lands sold for taxes. *Head v. James et al.*, 13 Wis., 641; *Lessee of Hannel v. Smith*, 15 Ohio, 134.

The statute requires land to be assessed by a "description sufficient to identify it." Code, § 821, ¶ 2. A failure to comply with this provision defeats the assessment, for the reason that in matters of taxation the statutes applicable thereto must be observed.

The defect, or rather the absence of description, found in the assessment, tax books, and treasurer's deed cannot be cured by extraneous evidence. It is not in the nature of a latent ambiguity which may be explained. Nor can evidence be received to apply the assessment and deed to the land contem-

plated by the intentions of the assessor or treasurer who executed the deed.

The tax proceedings and deed being void for this uncertainty, or rather absence of description, are to be regarded as incapable of support in this manner. As the absence of description runs through all tax proceedings and the treasurer's deed, one cannot have support from the others, all being alike void.

The description in this case, as it in no manner points to the land in question, which cannot be identified by any inquiry therein suggested, nor discovered from any data found therein, is unlike the descriptions held sufficient in the following cases, viz., *Immegart v. Gorgas et al.*, 41 Iowa, 439; *Judd v. Anderson*, 51 Iowa, 345. The descriptions in these cases locate each tract of land in a given corner of a government subdivision, a "forty," and specify the number of acres in each tract. The corner of the forty thus becomes a fixed monument, and the government lines become boundaries of the tract. As the description is held to call for a tract in a square form all its boundaries may be readily determined. But in this case the land is described as "three acres in the N. W. part" of a forty. The description does not call for either monuments or boundaries. It is applicable to an indefinite number of tracts of three acres which do not touch any line of the forty or have a corner common therewith. The cases cited do not, therefore, we think, support the ruling of the court below.

Upon the question of the invalidity of the assessment and tax deed because of the absence of sufficient description, see *Blair Town Lot Co. v. Scott*, 44 Iowa, 143; *Bosworth et al. v. Farenholz*, 3 Iowa, 84; *Vaughan v. Stone*, 55 Iowa, 213.

III. The plaintiff insists that as the tax upon defendant's personal property is made by the statute a lien upon his real ² ____: ____; estate, no question of the assessment thereof ^{sale invalid.} arises in this case. The position appears to be this: the assessment of defendant's personalty is regular and suffi-

cient, the tax levied thereon is a lien upon the lands owned by Deeds, which was properly sold for the tax in the absence of any assessment thereon. The position, for the purposes of the case, and without so holding, may be admitted. But the insuperable difficulty in the way of granting plaintiff relief, if this position be correct, is the absence of description of the land in the tax books, upon which the sale was made, and in the treasurer's deed. If the treasurer was authorized to sell the lands owned by Deeds to enforce the lien for taxes, the sale and deed made under it are void because of the absence of a description of the land. The defect in the description would invalidate a sale to enforce a lien upon personal property as well as a sale for the taxes upon the land itself.

IV. Plaintiff asks in his petition that if the treasurer's deed be declared void judgment may be rendered against the defendants in favor of plaintiff for the sum required to redeem the land from the taxes and the tax sale, which shall be declared to be a lien upon the land owned by Deeds as correctly described in the petition and the plat made an exhibit thereto.

3. ———: taxes
paid by pur-
chaser: re-
covery of.

We have held that where there is a void sale or deed upon a valid tax the purchaser at the tax sale may recover from the land-owner the amount required to redeem the land from taxes. *Everett v. Beebe*, 37 Iowa, 452. This case has been often followed. The ground of this ruling is that by the sale and tax deed all the right, title, interest, and claim of the county and State to the land sold is transferred to the purchaser. See Code, § 897. The interest of the county and State in the land is measured by the tax. Hence we hold that as the sale transfers to the purchaser that interest he may recover the tax from the land-owner. But the section of the Code above cited does not provide that the sale and deed shall operate to transfer to the purchaser the tax. And there is no statute to that effect. The tax was not, therefore, transferred to plaintiff by the deed and other proceeding. The sale and deed transferred no

 Small v. Older.

interest in the lands in question for the reason, as above shown that there was no description of the property found in any of the proceedings. The deed, assessment, and other tax proceedings being void, the sale transferred nothing to the purchaser. He cannot, therefore, claim to recover the tax as the transferee of the State and county.

This conclusion is in accord with *Early v. Whittingham*, 43 Iowa, 162. We are, therefore, of the opinion that plaintiff cannot, in this action, recover against defendants the amount of the taxes assessed against his personal property. Other questions discussed by counsel need not be considered as the points ruled herein are decisive of the case.

The court below should have dismissed plaintiff's petition.

REVERSED.

 SMALL V. OLDER.

1. **Principal and Surety: JOINT NOTE: VERBAL RELEASE OF ONE MAKER.** Where two persons gave their joint note for borrowed money, of which, by an agreement known to the lender, each was to have one-half, it was not a case of suretyship, but each was a principal for the whole amount; and a verbal agreement of the lender upon payment of one-half by one maker to look to the other for the balance due on the note, not shown to have been based upon a consideration, was not binding.
2. —: **MORTGAGES: APPLICATION OF PROCEEDS.** Where the proceeds of mortgages executed to secure an individual note and a joint note were not sufficient to pay both, the holder of the notes was under no obligation to apply the sum realized upon both notes, *pro rata*, but might apply the entire sum upon the individual note.

Appeal from Buchanan Circuit Court.

MONDAY, DECEMBER 12.

ACTION upon a promissory note. A judgment was rendered for plaintiff from which defendant appeals. The facts of the case fully appear in the opinion.

57	326
110	394
57	326
112	67
57	326
115	476
57	326
117	441

Charles Rausier and Boies & Couch, for appellant.

Sake & Harman and J. B. Powers, for appellee.

BECK, J.—The action is based upon a promissory note executed by defendant and James Jamison. As the questions in the case arise upon the rulings of the Circuit Court upon a demurrer to the answer and upon a motion to strike out certain parts thereof, it becomes necessary to fully present that pleading. It is in the following words:

"1. That on or about the 22d day of May, 1876, one James Jamison, and this defendant, borrowed of plaintiff the sum of six hundred and twenty-two and 50-100 dollars, each.

"2. That the whole sum borrowed was twelve hundred and forty-five dollars, but plaintiff, as well as this defendant and said Jamison, well knew that this defendant was to have and use for his individual benefit one-half of said sum, and said Jamison was to have and use as his own the other one-half of such loan, and that said defendant and Jamison should each be liable on the note given therefor as principal for the sum to be used by him, and as surety for the other one-half."

"3. That in pursuance of such agreement said plaintiff advanced to defendant and said Jamison the money so loaned, which was by them received and used as agreed, and they delivered to plaintiff the note in suit.

"4. That on the 27th day of January, 1867, defendant paid to plaintiff, to apply on said note, the sum of six hundred and sixty-four dollars and eighty-four cents, that being the sum then due and unpaid upon said note, for which defendant was liable as principal, and then agreed upon by plaintiff and this defendant.

And as a further defense said defendant answers:

"5. That about January 27th, 1877, this defendant paid to plaintiff to apply on said note the sum of six hundred and sixty-four and 8.-100 dollars, being the full sum received by

Small v. Older.

him on the loan aforesaid, and for which he was liable as principal at that date, of which fact plaintiff had knowledge; and thereupon defendant verbally notified and requested plaintiff to require of said James Jamison payment of his share of said note in suit, or such security therefor as plaintiff was willing to accept, without the personal obligation of this defendant.

"9. That afterwards, and on or about the month of April, 1877, this defendant, having concluded to go from the State of Iowa to the Pacific coast, again applied to plaintiff and notified him of his said intention, and again requested said plaintiff to either exact immediate payment from said Jamison of that part of the sum secured by said note for which he was liable as principal, or such security therefor as he was willing to rely upon, without the personal obligation of defendant, and gave as a reason for such request, that he (the said defendant) was about to remove from said State of Iowa, and would be unable to give the matter any further attention; and thereupon said plaintiff verbally agreed with this defendant that he would exact either immediate payment by said Jamison or ample and sufficient security therefor.

"10. That relying on said promise and agreement, this defendant in April, 1877, removed from said State of Iowa to the State of California, of which fact plaintiff had notice, and did not return to the State of Iowa until after the death of said Jamison, as hereinafter set forth.

"11. That at the time of the request and agreement, as hereinbefore stated, and of the removal of this defendant, as above stated, said Jamison was solvent and had in his possession, at and near his residence in Buchanan county, Iowa, a large amount of property, both real and personal, liable to be taken on execution against him, and plaintiff's claim could have been readily collected by action at law.

"12. That in pursuance of said agreement with defendant, plaintiff did apply to said James Jamison for payment or

Small v. Older.

security of his share of the sum secured by the note in suit for which said Jamison was liable as principal, and thereupon it was agreed by and between said plaintiff and said Jamison that said Jamison should execute and deliver to plaintiff a mortgage upon certain real estate to secure the same, in pursuance of which said Jamison did on the 10th day of May, 1877, make and deliver to said plaintiff a mortgage upon certain real estate owned by him; and subsequently, and on the 2d day of January, 1878, said Jamison to further secure said note made and delivered to plaintiff another mortgage upon certain other real estate then owned by him, both of which mortgages were duly acknowledged, and soon after their execution were recorded in the recorder's office of said county of Buchanan, where said premises are situated.

"13. And defendant says that at the time of the execution of each of the aforesaid mortgages, and of the making of said agreement by plaintiff with this defendant to obtain payment or security for the sum then due on the note in suit, the said Jamison was indebted to plaintiff in the sum of about sixteen hundred and sixty-five dollars upon his individual note, of which fact this defendant was wholly ignorant, and which fact said plaintiff concealed from this defendant, and said plaintiff caused and procured said mortgage so made by said Jamison to him to be so made and executed as to secure such individual note of said Jamison, as well as the joint note of himself and this defendant; but before the execution and delivery of either of said mortgages this defendant had removed from this State, as above set forth, and he was wholly ignorant of the fact that the securities so agreed to be procured by plaintiff, and which were in fact procured, were to, or did, secure other indebtedness than that represented by the note in suit in this action, and said defendant was not informed that any other indebtedness was secured thereby until after the death of said Jamison.

"14. That about the 2d of August, 1878, the said James

Small v. Older.

Jamison died at his residence in Buchanan county, Iowa, insolvent, his estate being then insufficient to pay his debts.

"15. That defendant relied upon the promise of plaintiff to exact payment of said Jamison of the sum due on said note in suit which he as principal was liable to pay, or ample security therefor, and solely by reason of such agreement neglected to take any steps to compel proceedings for collection thereof.

"16. That after the death of said James Jamison, plaintiff wholly failed to file any claim against his estate on the note in question, but thereafter did institute proceedings in the Circuit Court of Iowa for Buchanan county for the foreclosure of the mortgages aforesaid, and such proceedings were had therein that judgment of foreclosure was entered therein, and the mortgaged premises decreed to be sold to satisfy the sum secured without any judgment or order directing to what part of the indebtedness secured the sum realized from such sale should be applied.

"17. That in pursuance of such judgment said mortgaged premises were sold, and plaintiff bid the same in for the sum of twenty-two hundred and fifty dollars, a sum in excess of that due on the individual indebtedness of said Jamison to plaintiff, but insufficient to pay such indebtedness and the note in suit.

"18. That the claims filed against the estate of said James Jamison within the first six months after the appointment of an administrator of his estate and publication of notice by said administrator as required by law are sufficient to fully exhaust his said estate, and nothing whatsoever can be collected from said estate by defendant if compelled to pay the claim in suit.

"19. That no notice that plaintiff considered his security so taken from said Jamison insufficient to pay in full the claim in question was given defendant until after the expiration of six months from publication of notice to present claims by

Small v. Older.

the administrator of the estate of said Jamison, and until after that time defendant believed, and acted upon such belief, that said indebtedness had been paid or fully secured by said Jamison.

"Wherefore defendant prays judgment for his costs herein expended. That the allegations in his answer herein be taken and deemed a cross-bill; that this action be transferred to the equity docket; that the court ascertain and determine the nature of defendant's liability upon the note in suit, whether it be as principal or surety, and whether plaintiff agreed with defendant to exact payment from the principal debtor, or security as set forth herein, and whether defendant acted on such agreement, and whether by reason thereof defendant as surety has been prejudiced by plaintiff's failure to perform his said agreement to exact payment or security for the debt in question, and whether plaintiff did obtain from said Jamison security for the debt in question, and if so, what sum has been realized therefrom, and what portion of the sum so realized ought in equity to be applied to the payment of the claim in suit, and for general relief."

A motion to strike paragraphs 2, 5, 9, 13, 15 and 16, and a demurrer to the whole answer were sustained. These rulings are complained of in the assignment of error and argument of defendant's counsel.

II. It is first insisted that the answer shows defendant is surety for the other maker of the note and, therefore, upon the facts alleged in the answer he is discharged from liability. But we think the facts alleged fail to show that defendant was the surety of Jamison.

1. PRINCIPAL
and surety:
joint note:
verbal re-
leases.

It is alleged that they jointly borrowed the money for which the note was given under an arrangement known to plaintiff that each was to take half of the sum. This does not present a case of suretyship for each received a part of the consideration of the note and became jointly bound with the other for the whole. Each is a principal. The disposition of the money

Small v. Older.

for which the note was given did not change or affect the contract expressed in the note. It will be observed it is not alleged that the plaintiff agreed to hold the respective parties bound as principals for the sum received by each, and as sureties for the balance of the note. It is alleged that such an arrangement was made by the makers of the note which was known to plaintiff, but it is not averred that he became a party to the agreement.

III. The verbal agreement of plaintiff alleged in the second paragraph of the answer, to the effect that he would exact payment or security from Jamison, is not shown to be based upon a consideration. Defendant being, as we have seen, bound as a principal, would not be discharged by an agreement of plaintiff, without consideration, to collect the note from the other maker. If the defendant had been a surety as he claims, it is doubtful whether the agreement and notice pleaded would have been sufficient to relieve him from liability. It surely cannot, regarding him as a principal debtor.

IV. It is urged that upon the facts alleged in the answer plaintiff was under obligation to apply the sum realized upon the foreclosure of the mortgages *pro rata* upon the notes secured. The facts are these: plaintiff held a note signed by Jamison alone, and another, the note in suit, signed by Jamison and defendant. Jamison executed mortgages to secure both notes. There was not sufficient realized upon the foreclosure to discharge both notes, and plaintiff applied the proceeds from the foreclosure upon the note signed by Jamison alone. The law secures to plaintiff the benefit of all the securities he held, and will so appropriate the sum realized as to secure the payment of both debts. The plaintiff held but one security upon the debt secured by Jamison alone, namely, the mortgages. He held two securities for the debt owed by Jamison and defendant, the mortgages and defendant's name upon the note. Now, as against the debtors he is entitled to payment in full of his claims upon them. He

2. — :
mortgages :
application
of proceeds.

The State v. Dumond.

securities will be so enforced that this right will be preserved. If the proceeds of the mortgaged property are applied *pro rata* on both notes, this right will be defeated; if it be applied upon the note signed by Jamison alone, it will be preserved. It will be remembered that the debtors, Jamison and defendant, can base no equity upon any ground which would require proceedings resulting in the defeat of plaintiff, their creditor, as to any part of his claims. These views are correct whether defendant is to be regarded as a surety or principal in the note in suit.

It will be observed, too, upon reading defendant's answer, that it is not shown therein that the mortgages provided for the appropriation of the money realized thereon in the manner insisted upon by defendant. Nor is it shown that the appropriation made was not authorized by the conditions of the mortgages. In the absence of such averments in the petition, it will be presumed that the money was rightly appropriated; *omnia rite esse acta*.

No other points in the case are discussed by counsel. The judgment of the Circuit Court must be

AFFIRMED.

THE STATE v. DUMOND.

1. **Criminal Law: PRACTICE.** Where the transcript discloses no error and the verdict appears well supported by the evidence, the judgment below will be affirmed.

Appeal from Butler District Court.

MONDAY, DECEMBER 12.

THE defendant was indicted, tried and convicted of the crime of larceny, and he appeals.

No appearance for appellant.

Smith McPherson, Attorney-general, for the State.

Fisher v. Lane.

ROTHROCK, J.—The trial was had in the court below in the month of May, 1880. An appeal was taken to the October term, 1880, of this court at Dubuque. The cause was passed that term and also the April term, 1881. At the October term, 1881, the defendant having failed to file an abstract or argument, upon motion of the Attorney-general the cause was submitted upon the transcript.

We have carefully examined the transcript, which appears to be full and complete, and find no error in the rulings of the court upon the evidence, nor in the instructions given by the court to the jury. The verdict appears to us to be well supported by the evidence.

AFFIRMED.

FISHER V. LANE.

1. **Appeal: AMOUNT IN CONTROVERSY: PRACTICE.** The amount actually in controversy being less than one hundred dollars, the appeal cannot be entertained without the certificate required by section 3173 of the Code.

Appeal from Allamakee District Court.

MONDAY, DECEMBER 12.

ACTION in equity to foreclose a mortgage. There was judgment and decree for the plaintiff. Defendant appeals.

Richard Haney and H. F. Fellows, for appellant.

L. E. Fellows and T. F. Walker, for appellee.

ROTHROCK, J.—The validity of the promissory note and mortgage upon which the suit was brought was admitted. By the defendant averred an offer in writing to pay the amount due before the commencement of the suit. The effect of this offer appears to have been

1. **APPEAL:**
amount in
controversy:
practice.

Crewdson v. Middleton.

the matter in controversy in the court below. The defendant claimed that the offer was equivalent to a tender, and stopped the interest, and defeated the recovery of an attorney's fee which was provided for in the note and mortgage.

As the interest in controversy and attorney's fee allowed by the court are in the aggregate less than one hundred dollars, no appeal can be entertained without the certificate required by section 3173 of the Code. There being no such certificate, the appeal must be

DISMISSED.

CREWDSON V. MIDDLETON.

1. **Pleading:** JURISDICTION: PRACTICE. Where a petition avers a want of jurisdiction, and does not set out the facts upon which the alleged want of jurisdiction is based, a motion for a more specific statement is proper, and if made should be sustained.

Appeal from Harrison Circuit Court.

MONDAY, DECEMBER 12.

ACTION in replevin to recover possession of certain corn. The petition avers that the corn was taken upon an execution issued upon a judgment against plaintiff which was illegal and void, because the court which rendered the judgment had no jurisdiction of the defendant therein, the present plaintiff, nor of the subject-matter of the action.

The defendant moved for a more specific statement showing the facts upon which the want of jurisdiction was based.

The court sustained the motion, and the plaintiff electing to stand upon his petition, judgment was rendered for the defendant. The plaintiff appeals.

S. H. Cochran, for appellant.

Smith & Clyde and *R. A. Moore*, for appellee.

Martin v. Knapp.

ADAMS, CH. J.—It appears to us that the court was fully justified in sustaining the motion for a more specific statement. Behind the plaintiff's averment that the court which rendered the judgment lacked jurisdiction were of course certain facts upon which the plaintiff relied. If those facts had been pleaded the sole question the case might perhaps have been determined on demurrer. was the defendant's right to have the facts set out upon which the alleged want of jurisdiction was based.

AFFIRMED.

MARTIN V. KNAPP ET AL.

1. **Homestead: EXECUTION SALE.** The sale of lands at execution upon which the execution defendant resides, without platting and setting aside the homestead, is voidable, but not void, and cannot be attacked collaterally.
2. **Tenant at Will: GROWING CROPS.** Where one becomes a tenant will he takes the premises in their then condition, and is entitled to the crops growing thereon.
3. ———: **WHEN CREATED.** The failure of the owner, out of possession, to object to the possession of another, will not alone create a tenancy at will, and where the person in possession holds adversely, no tenancy at will exists. ●
4. **Sheriff's Deed: GROWING CROPS.** The execution of a valid sheriff's deed conveys the right to the immature crops growing upon the premises, and a person taking the same therefrom is not liable to the former owner of the land.

Appeal from Black Hawk Circuit Court.

MONDAY, DECEMBER 12.

In the petition and the amendment thereto it is alleged that John Howe, Sr., and Martin Howe, were in possession of certain lands described, and that in the spring and summer of 1876 they planted certain crops thereon and tended and cul-

57	336
83	712
57	336
106	186

Martin v. Knapp.

vated them until August 1st, 1876, with the knowledge and assent of the defendant J. T. Knapp; that on August 1, 1876, defendant Knapp commenced an action against the said Howes, and one Edward Carrigan, claiming to be the owner of said premises and entitled to said crops, and asking a temporary writ of injunction restraining the defendants from removing any of the grain growing upon the premises, and from appropriating it to their own use.

That said Knapp on that day, filed a bond with the defendant Miller as surety, in the sum of six hundred dollars, conditioned that said Knapp should pay all damages that the Howes and Carrigan should sustain by the wrongful issuing of said writ; that the writ issued and the said Howes and Carrigan were restrained from entering upon the premises, and from removing the crops or appropriating them to their own use; that the defendant Knapp entered upon the premises, and cut, harvested and carried away and appropriated to his own use the crops and grass growing thereon; that at the April term, 1878, Knapp withdrew the action commenced by him, without the consent of the defendants therein; that the writ of injunction was wrongfully and unlawfully issued, and by reason thereof John and Martin Howe were prevented from entering upon said premises, and from caring for and preserving the crops, whereby a large amount thereof went to waste and decay and was damaged by exposure to the weather, to the damage of said Howes in the sum of fourteen hundred and seventy-five dollars; that the cause of action arising to the said John Howe, Sr., and Martin Howe, has been by them duly assigned in writing to the plaintiff and he is the owner thereof. Plaintiff asks judgment against the defendants Knapp and Miller for the sum of \$600, and against the defendant Knapp for the further sum of \$875.

The defendants answered alleging that on the 2nd day of May, 1876, the defendant Knapp became the owner in fee simple of the premises described in the petition by virtue of a

Martin v. Knapp.

deed of that date, executed to him by the sheriff of Grun county, pursuant to a sale of said premises by said sheriff on the 1st day of May, 1875, under an execution issued by the clerk of the Circuit Court of Black Hawk county, upon a judgment in said court recovered by H. Ruble against the said John Howe, Sr.; that Knapp remained such owner until the 29th day of August, 1876, when he lost the title thereof, by the execution and delivery of a deed from the said sheriff to one Marietta H. Candee, which deed was made under a sale by the sheriff on the 28th day of August, 1876, under a special execution issued by the clerk of the Circuit Court of Grun county, pursuant to a decree in an action wherein said Candee was plaintiff, and said John Howe, Sr., and his wife, and the said H. Ruble, were defendants, for the foreclosure of a mortgage executed by said Howe and wife to said Candee to secure the purchase-money of said premises; that as the owner of said land and entitled to the possession, profits and use thereof, said Knapp, during the time of such ownership, as alleged herein, took and converted to his own use the wheat and other crops thereon at that time, and after the 29th day of August, 1876, said Knapp as the agent of said Candee, the owner of said premises, did take certain other crops at that time standing and growing thereon; and defendants say that John and Martin Howe had no interest in or right to the said premises, and no right to the possession thereof or the said crops growing thereon at the date of said deeds.

The plaintiffs filed a reply averring in the first count that the sale and deed to Knapp were and are wholly void because of the fact that said John Howe, in whom the legal title was vested, at the time of said deed, was a married man, the head of a family, and then lived with his family on a farm composed of the premises in question and forty acres contiguous thereto, which he used and cultivated as one farm, and which farm then constituted his homestead, and before said sale and deed no homestead of said John Howe on said farm had been

Martin v. Knapp.

platted or recorded, or in any manner selected by him as provided by law, and the sheriff making the sale failed to cause the homestead to be platted before making the sale. The second count of the reply contains the same allegations as to the sale and deed to Candee.

The third count of the reply alleges that after Knapp had received his deed under the first sale, he suffered and permitted the said John Howe to remain in the peaceable possession of said premises and to rent the same as his own to plaintiff's assignor, Martin Howe, who was wholly ignorant of said sheriff's sale and deed, and permitted said Howe to plant the land with crops, and expend large sums of money and much labor in the cultivation thereof, all of which was done with the full knowledge and consent of said Knapp, and after said crops had been raised and matured, he wrongfully sued out the writ of injunction mentioned in the petition, and deprived said Martin and John Howe of the fruits of their labor. The defendants filed a demurrer to the first and second counts of the reply on the ground that the plaintiff in this action cannot collaterally attack the titles of Knapp and Candee under said sales and sheriff's deeds. This demurrer was overruled, to which the defendants excepted. The defendants filed a second and third amendment to their answer, which need not here be set out. The cause was tried to a jury, and a verdict was returned and judgment rendered for the plaintiff for two hundred dollars. Both parties appeal.

Boies & Couch, for plaintiff.

Hemenway & Polk, for defendants.

DAY, J.—I. *As to the plaintiff's appeal.*

1. In the ruling upon the demurrer to the reply, and in the admission of the evidence upon the trial, the court adopted the plaintiff's view that it was competent to inquire into the validity of the title of Candee and of the defendant Knapp,

Martin v. Knapp.

under their respective sheriff's deeds. When, however, the court came to charge the jury, it instructed as follows:

"You are instructed in the first place to disregard all testimony admitted, bearing on the question of the validity of the sheriff's sales and deeds; and you should treat the deed made by the sheriff to defendant Knapp as valid, and as conveying to him the absolute title and ownership of the premises in question and the crops thereon at the date of said deed, to-wit: May 2, 1876."

The plaintiff assigns the giving of this instruction as error. It is insisted that the sale and sheriff's deed to both Candee and the defendant Knapp, are void, because the

1. HOMESTEAD:
execution sale. homestead of John Howe was not platted and set apart before the sale.

The evidence shows that John Howe owned 255 acres of land, which he used together as a farm, one-half situated in Black Hawk county, and one-half in Grundy county, separated by a highway, and that the dwelling in which he resides, and all the appurtenant buildings, are situated upon the land in Black Hawk county. The land involved in this controversy is situated in Grundy county.

The plaintiff relies upon *Linscott v. Lamart*, 46 Iowa, 315, and *White v. Rowley*, Id., 680. In *Linscott v. Lamart*, the execution defendant owned but seventy-one and $\frac{1}{10}$ acre. One-half of it was sold, leaving less than the forty acres to which the execution defendant was entitled as a homesteader. It was because more land was sold than was liable to be sold in satisfaction of the judgment that the sale was held void. In *White v. Rowley*, as in this case, enough land for the execution defendant's homestead was left, but the action was a direct proceeding to set the sheriff's sale aside. The sale was simply held invalid. In our opinion a sheriff's sale made as shown in the present case, is voidable but not void. It might be set aside in a direct proceeding between the parties, instituted within proper time. Still, it may be to the interest of

Martin v. Knapp.

the execution defendant that the sale should stand, and he has a right to disregard the irregularity, if he see proper. The sale cannot be collaterally called in question, as was attempted in this case. The court did not err in giving this instruction.

2. The court in substance directed the jury that if plaintiff could recover at all, it was solely upon the ground that his assignor, Martin Howe, became a tenant at will, of the defendant Knapp. The court further instructed the jury as follows: "If you find plaintiff entitled to a verdict under the evidence and the preceding instructions, you should allow him the actual value, on August 2, 1876, of such of the crops as were planted after May 2, 1876, and the value of the work done upon the other crops between said dates."

May 2, 1876, is the date of the sheriff's deed to Knapp, and August 2, 1876, is the date of the service of the injunction. The idea of the court seems to be that if Martin Howe became a tenant at will of Knapp, by being allowed to remain in possession of the premises, after Knapp became entitled to them under the sheriff's deed, executed May 2d, he became such tenant only as to such of the crops as were planted after May 2d, and not as to the wheat and oats and other crops, which were then growing upon the land. This position, we think, is erroneous. If Martin Howe became a tenant at will, he became a tenant of the land in its then condition, entitled to the crops growing at the time, as well as to those subsequently planted, and liable to account for the reasonable rental value of the premises, which would be enhanced by the fact that, at the time the tenancy began, immatured crops were growing upon the premises. In giving this instruction, we think the court erred.

3. The petition in the action in which the injunction was issued out alleges that the defendants in that action trespassed upon plaintiff's premises and stock; that they claim to be the owners of said crops, and threaten, and intend to, and are

Martin v. Knapp.

about to remove said crops and appropriate them to their own use, and that they will do so unless restrained by injunction. There was evidence tending to show that plaintiff's assignor, the Howes, were in actual possession of the lands in question claiming the same adverse to the defendant Knapp; that such possession was originally rightful, and before the service of the writ of injunction had never been surrendered or disturbed. Plaintiff asked the court to instruct that if the Howes were in possession, Knapp could not maintain an action of trespass, and therefore the injunction was wrongfully sued out. The refusal to give this instruction is assigned as error. It is claimed by plaintiff that where there is an actual adverse possession by another, the owner cannot maintain trespass. Under our system of procedure, all forms of action are abolished. Although the petition alleges that the defendants trespassed upon the premises, yet the gist of the action is to prevent the Howes from appropriating to their own use crops which the defendant Knapp claims to be his. Knapp might maintain an action for this purpose, notwithstanding the fact that the Howes were in possession of the premises. There was no error in refusing the instruction.

II. *As to the defendants' appeal.*

1. The court instructed the jury as follows: "6. The only questions * * * * * remaining for your consideration are as to whether the plaintiff's assignor, Martin ^{3. —; when created.} Howe, became a tenant at will of said defendant Knapp, and that thereby the said writ of injunction was wrongfully issued, and, if so, the amount of damages thereby sustained.

"7. The statute provides that any person in the possession of real property with the assent of the owner is presumed to be a tenant at will until the contrary is shown,

"Such assent need not be in the shape of an express agreement written or spoken between the parties, but it is sufficient to create such tenancy in this case, if the defendant Knapp

Martin v. Knapp.

When knowledge came to him of the occupancy and cultivation of the premises in question, failed to object thereto, and acted as to lead said Martin Howe, in the exercise of a reasonable understanding under the circumstances, to believe that said Knapp did not object to his remaining on said premises and cultivating same."

The evidence is abundant that whilst Knapp insisted that his rights as landlord of the premises should be recognized, Martin Howe refused upon all occasions to admit that Knapp had any rights on the premises, and would not recognize him as landlord, but claimed to hold adversely to him, under John Howe, Sr. The error in this instruction is in assuming that the failure of the owner out of possession to object to the possession of the occupant, will alone create a tenancy at will. A tenancy at will cannot be created without the assent, express or implied, of both parties. The statute provides, section 1014, Code 1873, that "any person in the possession of real property with the assent of the owner, is presumed to be a tenant at will, until the contrary is shown." Possession with the assent of the owner raises merely a presumption of a tenancy at will, which may be rebutted. When it is shown that the person in possession does not recognize the owner as landlord, but holds adversely, either as owner, or as the tenant of another whom he recognizes as owner, the presumption of a tenancy at will is rebutted. The court erred in giving this instruction.

-2. The evidence shows that on the 28th of August, 1875, the premises in controversy were sold at sheriff's sale to Marietta H. Candee, under the foreclosure of a mortgage against John and Catharine Howe as mortgagors, and H. Ruble and J. T. Knapp, as subsequent encumbrancers.

A sheriff's deed was executed to Candee, August 29, 1876. The mortgage was senior in point of right to any claim of Knapp, and the sheriff's deed, executed pursuant to the fore-

SHERIFF'S
deed: grow-
ing crops.

Wetmore v. McMillan.

closure thereof, divested all of Knapp's rights in the premises. If, therefore, a tenancy at will existed between Knapp and Martin Howe, it terminated on the 29th day of August, 1878, and all of Knapp's rights, and Howe's as well, were transferred to Candee. At this time the corn crop was growing upon the premises, immature. The defendants requested the court to instruct as follows: "After the execution of the deed to Candee, the defendant Knapp ceased to have any right to the possession of the premises, and if he took any crops therefrom after that date, he must account to Candee therefor, and plaintiff cannot recover therefor in this action." This instruction, or one embodying its principles, should have been given.

This decision sufficiently indicates our view of the law in the case, without further consideration of the errors discussed by the defendant. One-half of the costs of this appeal will be taxed to the plaintiff, and one-half to the defendants.

On both appeals the judgment is

REVERSED.

WETMORE V. McMILLAN ET AL.

1. **Practice in the Supreme Court.** An objection not presented in the motion to strike, or in any manner raised in the court below, will not be considered.
2. **Bankruptcy: STATE COURTS: ACTION BY ASSIGNEE.** An assignee in bankruptcy may maintain an action in the state courts to recover property of the estate, when the right thereto does not depend upon the provisions of the bankrupt law.
3. —: —: **INTERVENTION.** The assignee acquires such an interest in the property of the bankrupt as authorizes him to intervene under section 3228 of the Code, or maintain an independent action for the recovery of the property fraudulently conveyed by the bankrupt.

Appeal from Guthrie District Court.

MONDAY, DECEMBER 12.

On the 20th day of July, 1878, the plaintiff commenced an action against the defendant, James McMillan, sheriff, an action

Wetmore v. McMillan.

replevin for certain personal property, alleging that the plaintiff is the owner and entitled to the immediate possession thereof. A writ of replevin was issued and the plaintiff was placed in possession of said property. The defendant answered, averring that he seized said goods, and held possession thereof, by virtue of a writ of attachment issued in a proceeding wherein one C. H. Zinn was plaintiff and one J. A. Thompson was defendant, and that the goods were at the time said levy the property of said Thompson.

At the same time Dan. Brown, as assignee in bankruptcy of said J. A. Thompson, appeared and filed a petition in intervention. In the first count of the petition it is alleged in substance that J. A. Thompson was adjudged a bankrupt on his own petition by the District Court of the United States for the District of Iowa, which cause is now pending; that on the 26th day of September, 1878, John Mitchell, Esq., one of the Registers in Bankruptcy, conveyed unto intervenor as assignee of the said J. A. Thompson, all his estate, real and personal, including the property in controversy; that on the 17th day of July, 1878, J. A. Thompson was the owner and possessor in his own right of a stock of general merchandise, and was carrying on the business of a retail merchant in the city of Panora, in the county of Guthrie; that while carrying on said business Thompson sold on credit and accumulated a large amount and number of accounts; that on or about the 17th day of July, 1878, said Thompson being insolvent, with intent to cheat and defraud his creditors, and to hinder, and delay them in the collection of their several claims, did, combining and conspiring with plaintiff herein, make a pretended sale and conveyance of his entire stock in trade and books of account to plaintiff, for no consideration, or if any consideration, only nominal and fraudulent one, for the purpose of placing said property beyond the reach of his creditors; that the plaintiff, with full knowledge of the fraudulent intent and purpose of said Thompson, and with full knowledge of his insolvency, and

Wetmore v. McMillan.

with intent and purpose on his part of aiding Thompson in defrauding, hindering, and delaying his creditors, made a pretended purchase of all the merchandise and accounts of Thompson, and now claims to be the owner thereof; that on or about the 17th day of July, 1878, Charles H. Zinn, a creditor of Thompson, commenced a suit in the Guthrie District Court by attachment, and levied upon the goods and property claimed in plaintiff's petition as the property of said Thompson, for the purpose of collecting and securing his claim against Thompson, and the plaintiff thereafter commenced the present suit in replevin to recover said goods, and gave bond with sureties conditioned for the return of said goods, and the payment of all costs that might be adjudged against him.

The second count of the petition alleges in substance that the attachment suit of Charles H. Zinn against said John Thompson was commenced on or about the 17th of July, 1878, within four months next preceding the date of the filing of the petition in bankruptcy by Thompson, which petition was filed August 2, 1878, and that upon making an assignment of the estate of Thompson to petitioner the attachment was dissolved by operation of law, and the attached property passed to and vested in petitioner as the assignee in bankruptcy; that on or about the 17th day of July, 1878, said Thompson, being insolvent a period within six months before the filing of said petition in bankruptcy, made a sale and conveyance of his entire stock in trade as a retail merchant to Ira Wetmore, who then had reasonable cause to believe said Thompson to be insolvent, and knew said sale was made with a view of preventing the property of said Thompson from coming into the hands of his assignee in bankruptcy, and of preventing the same from being distributed under the bankruptcy statutes of the United States; that said sale was made out of the usual and ordinary course of trade, and for the purpose of defrauding the creditors of Thompson, in which fraudulent purpose Wetmore

Wetmore v. McMillan.

icipated; that the property so conveyed was of the reasonable value of twenty-five hundred dollars.

petitioner asks to intervene, and that he have judgment for surrender and delivery of said goods and accounts to him as assignee, and that in default of the delivery of said goods and accounts, he have judgment for \$2,500 against said party and the sureties on the replevin bond.

The plaintiff moved the court to strike the petition of intervention from the files on the ground that the petition shows affirmatively the intervenor has no interest in the subject-matter of the action, and the court has no jurisdiction over the matters pleaded in the petition of intervention. The court sustained the motion as to the second count of the petition of intervention, and overruled it as to the first count. From the overruling of the motion as to the first count the plaintiff appeals.

Charles S. Fogg and Wright & Wright, for appellant.

Brown & Dudley and S. D. Nichols, for appellee.

DAY, J.—I. No complaint is made of the order of the court striking out the second count of the petition of intervention. The ruling is clearly in accord with the ^{PRACTICE} ^{the su-} ^{pre-} ^{me} court. holding of this court in *Hecht v. Springstead*, 51 Va., 502; and *Brewster v. Dryden & Berry*, 53 Id., 657. The appellant contends that when it is conceded that the court could not take jurisdiction of the matter set up in the second count of the petition, the appellee in effect surrenders his whole case, because the relief prayed is predicated upon the whole petition, and no separate relief is asked on the first count alone. We regard it a sufficient answer to this position that no such objection is made in the motion to strike the petition from the files, nor was such objection raised to the first count in any manner on the court below. If it had been, the intervenor might have amended his petition.

Wetmore v. McMillan.

II. There has been much discussion and considerable conflict as to the right of an assignee in bankruptcy to maintain

2. BANKRUPT- an action in the State courts to recover the assets
CY : state
courts : ac- of the bankrupt. In the case of *Clafin v. Houseman*, 93 U. S., 130, it was authoritatively settled
tion by as-
signee.

the Supreme Court of the United States that under the bankrupt act of March 2, 1867, an assignee might maintain a suit in the State courts. This decision was made upon a controversy arising prior to the enactment of section 711, Revised Statutes of the United States, which provides that jurisdiction vested in the courts of the United States shall be exclusive of the courts of the several States of all matters and proceedings in bankruptcy. In *Clafin v. Houseman*, supra, referring to this section the court say: "Whether this relation will or will not affect the cognizance of plenary actions and suits it is not necessary now to determine." In *H. C. Springstead*, 51 Iowa, 502, it was held that the State courts have no jurisdiction in an action to vacate a judgment valid under the laws of the State, but invalid by reason of being in fraud of the Federal bankrupt law. In *Brewster v. Dryden Berry*, 53 Iowa, 657, it was held that a State court has no jurisdiction to cancel a conveyance valid under the laws of the State upon the ground that it was made in contravention of the bankrupt law. Neither of these cases touches the question presented in the first count of the intervenor's petition. In that count of the petition it is sought to set aside a conveyance of the property of the bankrupt, because made in fraud of the rights of creditors under the common law and the laws of the State. The invalidity of the conveyance does not depend upon any provision of the bankrupt law.

An amendment of section 4974 of Revised Statutes of the United States, adopted June 22, 1874, is as follows: "Provided, that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands

l, when such debt does not exceed five hundred dollars, be
ected in the courts of the State where such bankrupt re-
s having jurisdiction of claims of such nature and amount."
ppellant relies upon this provision of the statute as nega-
g any jurisdiction of the State courts, except in cases
re the amount does not exceed five hundred dollars, and
court having jurisdiction of the estate has directed the ac-
to be brought in the State court. Referring to this pro-
on the Supreme Court of Massachusetts, in *Goodrich v.*
son, 119 Mass., 429, say that its effect "is not to confer or
away jurisdiction of the State courts, but simply to allow
Federal courts of original jurisdiction to decline to enter-
actions at common law to which the assignee is a party, in
ch the debt demanded is less than the amount which de-
mines the jurisdiction of those courts in other cases." We
k this is the correct construction of this statute. In
der v. Honobin, 72 N. Y., 159, the court of appeals of
York hold that, notwithstanding the provisions of sec-
711, and the amendment to section 4974 of the Revised
ntes above referred to, a State court has jurisdiction of an
on by an assignee in bankruptcy to recover a debt due the
krupt. In the course of a well prepared opinion the court

"When a common law action is an appropriate remedy
nforce a right asserted by an assignee in bankruptcy,
ther the right is given by the bankrupt act, or existed in
r of the bankrupt before the bankruptcy, an action to
ce or vindicate the right is not a matter or proceeding in
ruptcy within section 711. The exercise of the original
rdinary jurisdiction of the State courts in such cases is
o proper sense an exercise of jurisdiction in bankruptcy.
fact that the plaintiff makes his title under the bankrupt
y assignment from the debtor, or by force or operation of
ct itself, does not make the suit a matter or proceeding
nkruptcy, any more than would a suit brought by an as-
ee appointed under the State insolvent law to recover a

debt owing to the insolvent be a proceeding or matter in solvency." A portion of this language may seem to conflict with the decisions of this court in *Hecht v. Springstead*, and *Brewster v. Dryden & Berry*, *supra*, but the point actually decided is not in conflict with those cases. There is a manifest distinction between an action brought in a State court by an assignee in bankruptcy to enforce a right which depends for its existence entirely upon the provisions of the bankrupt law and an action to enforce a right or recover a claim existing under the common law, or under the laws of the State. We think that an assignee in bankruptcy may maintain an action in the State courts to recover the property of the estate in a case where his right to the property does not depend upon the provisions of the bankrupt law.

III. Section 3228 of the Code provides: "If a third person claim the property, or any part thereof, the plaintiff may, at any time before judgment, amend and bring him in as a co-defendant, or, by intervention. The defendant may obtain his substitution by the process of the court, or the claimant may himself intervene by the process of the court as an intervenor." It may be conceded that a debtor who fraudulently conveyed his property could not intervene in an action for the purpose of setting the conveyance aside. It may further be conceded that a simple creditor, without any interest in the property, would not have such interest in the property as would authorize him to intervene and claim the property. But an assignee in bankruptcy stands in a position different from the debtor or a simple creditor. He succeeds to the rights of the debtor and in addition thereto he becomes the agent of all the creditors for the protection of their rights. There can be no doubt that an assignee in bankruptcy acquires such an interest in the property of a bankrupt fraudulently conveyed that he may maintain an independent action to recover the property. See *Len v. Massey*, 17 Wal., 351; *In re Gurney*, 15 B. R., 117; *In Miles v. Jones*, 15 B. Reg., 150, it is said by Strong, J., that, notwithstanding some decisions to the contrary, an assignee

The State v. Conneham.

bankruptcy stands in the position of a judgment creditor, and that the adjudication of bankruptcy is equivalent to the recovery of a judgment and a levy. See, also, *Adams v. Merchants' National Bank of Indianapolis*, 2 Federal Reporter, 74; *In re Werner*, 5 Dillon, 119.

If the assignee acquired such an interest in the property in controversy that he could have instituted in the courts of this state an independent action to recover it, it follows necessarily, we think, that he acquired such interest as authorizes him to intervene under the provisions of section 3228 of the Code. The court, in our opinion, did not err in refusing to strike from the files the first count of intervenor's petition.

AFFIRMED.

THE STATE V. CONNEHAM.

Criminal Law: MISDEMEANOR: APPEARANCE BY COUNSEL. An indictment for resisting an officer serving legal process charges a misdemeanor. In such case the defendant may appear by counsel and demand a trial, and it was error for the court to refuse a trial and order a forfeiture of the bond.

—: **APPEAL: FINAL ORDER.** The order of forfeiture determined the defendant's liability on the bond, and was, in this case, a final order, from which defendant could appeal.

Appeal from Story District Court.

MONDAY, DECEMBER 12.

AT the September term, 1880, of the Story District Court the defendant was indicted for resisting an officer serving legal process, and at the same term he appeared in person and by counsel and waived arraignment and filed a plea of not guilty. The cause was thereupon continued to the February term, 1881, and the defendant gave bond for his appearance in the sum of

The State v. Conneham.

\$200. At the February term, the defendant not appearing in person, his bond was forfeited, and judgment was rendered against the defendant for thirty dollars, the costs of suit. The defendant appeals. The material facts are stated in the opinion.

Martin & Sellers and *J. S. Frazier*, for appellant.

No argument for appellee.

DAY, J.—I. At the February term, 1881, the defendant's attorney filed a motion stating that the clerk of the court refused to issue subpoenas for the defendant's witnesses, and asking the court to require the clerk to issue subpoenas for five witnesses named. On February 3d this motion was sustained, and the clerk was required to issue subpoenas.

On the 4th of February the defendant's attorney filed a motion and affidavit for a continuance till the next day, or to the subsequent term of the court, setting up the particular facts intended to be proved; that defendant was unable to obtain subpoenas until the third, and that by a mistake of the deputy sheriff the witnesses were not subpoenaed to appear on the fourth. The State filed no objections to the motion for a continuance. The court thereupon overruled the motion for a continuance. The case was then called for trial, and the defendant did not appear in person, but appeared by attorney, who waived the defendant's personal appearance and announced himself ready for trial, and demanded a trial. The court refused to try the cause and forfeited the defendant's bond, and afterward, upon motion of the district-attorney, rendered judgment against the defendant for thirty dollars costs.

The offense for which defendant was indicted is a misdemeanor. Code, § 3960. Section 4351 of the Code provides: "If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel."

The State v. Conneham.

Under this statute it was competent for the defendant to appear by counsel and demand a trial. It was error for the court to refuse the defendant a trial and order a forfeiture of the bond. See also sections 4461 and 4497, which render it unnecessary that the defendant should be personally present at the rendition of the verdict or the pronouncing of a judgment in the case of a misdemeanor. If the defendant had been convicted and had failed to surrender himself in execution of the judgment, it would then have been a proper time for the forfeiture of his bond. Code, § 4596. This disposition of the case renders unnecessary a consideration of the other errors discussed.

II. The attorney-general submitted with the cause a motion to strike the case from the docket, and dismiss the appeal upon the ground that no judgment has been entered by said court. It is insisted in the motion that the order of forfeiture of the bonds is only preliminary to a writ upon the bond. The order of forfeiture, however, does determine the defendant's liability upon the bond, so far as that can be done in this case, and is, so far as this case is concerned, a final order. In order to get rid of this order, and obviate the necessity of defending an independent action upon the bond, we think the defendant may prosecute an appeal. Besides, a judgment for costs has been rendered against the defendant and execution directed to issue immediately thereon. This judgment is final and from that the defendant may appeal.

REVERSED.

Wendling v. Taylor.

WENDLING V. TAYLOR ET AL.

1. Promissory Note: EXTENSION OF TIME: DISCHARGE OF SURETIES.

Where the special findings showed an agreement between the plaintiff and the principal for an extension of time on the note sued on, there was evidence tending to show a consideration therefor, the court was not authorized to infer, in the absence of any finding as to the consideration, that none existed, and judgment against the sureties was erroneous.

2. ———: USURY: PRACTICE. The question of usury not having been presented in the court below, cannot be first presented here.*Appeal from Winnesheik Circuit Court.*

MONDAY, DECEMBER 12.

ACTION upon a promissory note. There was a verdict for the plaintiff; judgment for plaintiff; defendants appeal.

Cooley, Fannon & Akers, for appellants.*Brown & Willington*, for appellee.

BECK, J.—I. The defendants, Thomas Taylor and Joseph Triska, answered the petition; the other defendants made no answer. The answer alleges: *first*, that the note in suit was made on Sunday; *second*, that they signed it as sureties, which was well known to plaintiff; *third*, that plaintiff for a valuable consideration extended the time of payment of the note by a binding agreement with the principal without the consent of the defendants; and, *fourth*, that the note has been fully paid.

The court submitted to the jury questions for special findings which, with the answers, are as follows:

"1st. Was the note in suit signed on Sunday? Ans. Yes.

"2d. Was it delivered to the plaintiff on Sunday? Ans. Yes.

"3d. Did the plaintiff, when he received the note, know that it was signed on Sunday? Ans. No.

"4th. Was the note in suit included in the \$3,000 which the mortgage was given to secure? Ans. No.

Wendling v. Taylor.

5th. Was the note in suit included in the settlement at
 Ellville? Ans. No.

6th. Was there an agreement to extend the time of pay-
 ment on the note in suit? Ans. Yes.

7th. Was there an agreement made, after the note in suit
 was given, that an additional five per cent interest should be
 added thereon—that is, five per cent more than was at first
 agreed to be paid? Ans. No.”

The jury were not required to render a general verdict and
 did not do so.

The defendants moved the court for judgment upon the
 special findings. The motion was overruled and judgment
 entered for plaintiff. A motion by defendants for a new
 trial, based upon the grounds, among others, that the findings
 of the jury did not support the judgment, and the motion for
 judgment by defendants ought to have been sustained, was
 overruled. Exceptions were duly taken to the overruling of
 defendants' motion for judgment and for a new trial.

I. In our opinion the Circuit Court erred in rendering
 judgment for plaintiff upon the special findings of the jury
 and in overruling the motion for a new trial. The
 sixth special finding is that there was an agree-
 ment between plaintiff and the principal in the
 note to extend the time of payment. If such agreement was
 based upon a consideration so that it would have been binding
 upon the plaintiff he is not entitled to recover in this action.
 The jury found the agreement, but were not required to find
 whether it was based upon a consideration. The issue as to
 whether a valid agreement was presented in the pleadings, and
 whether there was evidence tending to show that there was such a con-
 sideration, and that it was based upon a consideration. The court
 was not authorized to infer and so hold, in the absence
 of any finding as to the consideration, that none in fact existed.
 It is very plain that if it be conceded that the findings do not
 show that the agreement was based upon a consideration, they

McIntosh v. Lee.

are not responsive to the pleadings in the case presenting issue. They did not therefore authorize judgment for plaintiff.

III. Plaintiff's counsel insist that the instructions of the court presenting to the jury the questions for special finding were not excepted to in the court below. There is some doubt upon this point. It need not, however, be considered, as the foregoing views dispose of the case.

IV. The defendants maintain that the court below erred in not rendering the judgment required by law on account of

2. —: usury established by the testimony. It is a
usury :
practice. cient to say that no such question was made in the court below, and usury was not pleaded in the case. This question cannot be first presented in this court. Other points noticed by counsel need not be considered.

REVERSE

MCINTOSH v. LEE.

1. **Pleading: EVIDENCE: JUDICIAL NOTICE.** Where the petition alleges that the written lease in question was executed March 10th, 1878, and the lease bore the same date, parol evidence that it was not executed on the day it bore date was incompetent. Courts will not give judicial notice that a particular date falls on Sunday.
2. **Lease: VOID: RATIFICATION OF.** The mere occupation of premises will not amount to a ratification of a void lease. Some new promise or condition in respect thereto is necessary.
3. **Damages: PROOF OF: PRACTICE.** The amount of damages must be proved or the party is entitled to nominal damages only; and a judgment will not be reversed for a failure to assess mere nominal damages.

Appeal from Winneshiek Circuit Court.

MONDAY, DECEMBER 12.

THE petition of plaintiff alleges that on the 10th day of March, 1878, the defendant, Arent Thompson Lee, entered into a written lease for certain premises from plaintiff for the

McIntosh v. Lee.

three years, commencing on the 1st day of March, 1879, and agreed to pay one-half of grains raised thereon; that when the term commenced there was about 90 acres of plowed land on the premises, and defendant, by the terms of the lease, for part consideration for the use of the premises, agreed to plow the ground, plowed as aforesaid, each fall, and have the plowing done at the end of the term in a good and husbandman-like manner; that in the fall of 1879 the defendant neglected and refused to do all the plowing that he should have done as agreed by him by the terms of the lease, and will refuses so to do; that the reasonable value of the plowing which the defendant should have done, and which he did not do, is the sum of sixty dollars; that the defendant has abandoned the premises and refuses to fulfill the lease, to the damage of plaintiff in the sum of five hundred dollars. The plaintiff asks judgment for these sums, and that a writ of attachment issue to enforce his landlord's lien upon certain grain grown upon the premises. The defendant filed an answer as follows:

"1. Denies that he is indebted to the plaintiff in any sum whatever.

"2. Defendant further answering shows that he admits the execution and delivery of the lease in plaintiff's petition set out, but avers that the same was so executed and delivered on Sunday, and therefore the same is void."

The cause was tried to the court and judgment was rendered for defendant. The plaintiff appeals.

Willet & Willet, for the appellant.

No argument for the appellee.

DAY, J.—I. The plaintiff testified that the lease was not executed on Sunday, and that after the delivery of the lease the defendant entered upon possession of the premises, and cultivated them one year. No other evidence was introduced. To the testimony that

LEADING:
evidence:
official no-
e.

McIntosh v. Lee.

the lease was not executed on Sunday the defendant objected as incompetent, for the reason that no issue of that kind was presented in the pleadings, and the evidence tends to vary from the terms of a written contract. The court made no ruling upon the objection, but, upon the submission of the cause, rendered judgment for the defendant. The petition alleges that the defendant entered into the written lease in question on the 10th day of March, 1878. Courts take judicial notice that the 10th day of March, 1878, was Sunday. The petition, therefore, in effect alleges that the lease was executed on Sunday. The answer alleges the same thing. Notwithstanding this admission of the pleadings, the plaintiff seeks to have the court consider his testimony that the lease was not executed on Sunday.

If the plaintiff had alleged that the lease, although bearing the date of March 10th, 1878, was not in fact executed upon that day, it might have been competent to prove upon that day the lease was executed. But under a petition alleging that it was executed on the day it bears date, it was not competent to prove that it was executed upon a different date.

II. It is claimed that whilst the petition does not in fact allege a subsequent ratification of the contract, yet it alleges facts which, under a liberal construction, show a ratification. We think the petition does not allege a ratification of the lease. It does not expressly allege that the defendant entered upon and occupied the premises except as implied from the allegation that he abandoned them. But something more than mere occupation of the premises would be necessary to the ratification of the lease. It might render the tenant liable under an implied promise for the *quantum meruit*, but not for the rent stipulated in the lease according to its terms. To that end some new promise to perform the terms of the lease, or something equivalent thereto, is necessary.

III. There is another reason why the judgment in this

Hough v. Hamlin.

cannot be reversed. The first part of the answer tenders no
DAMAGES: issue upon any allegation of fact in the petition.
 proof of:
 practice. *Mann v. Howe*, 9 Iowa, 546. "Every material
 allegation of the pleading not controverted by a subsequent
 pleading, shall, for the purpose of the action, be deemed true."
 Code, section 2712. "But an allegation of value, or amount
 of damage, shall not be deemed true by a failure to contro-
 vert it." *Id.*

The allegation, therefore, that the plaintiff is damaged sixty
 dollars on account of a failure to do the breaking, and five
 hundred dollars on account of the abandonment of the prem-
 ises, is not admitted by a failure to deny it.

The plaintiff introduced no proof of the amount of his dam-
 ages, and was, therefore, at the most, entitled to a judgment
 for but nominal damages.

We have held that we will not reverse a case and order a
 new trial for a failure to assess mere nominal damages. *Wat-
 son v. Van Meter*, 43 Iowa, 76.

The judgment is

AFFIRMED.

 HOUGH V. HAMLIN ET AL.

Usury: BURDEN OF PROOF: EVIDENCE. The burden of showing that
 any particular transaction was usurious, is upon the party pleading
 usury by way of defense. The evidence in this case considered and held
 not sufficient to establish the defense of usury.

Appeal from Floyd District Court.

MONDAY, DECEMBER 12.

ACTION to foreclose a mortgage. Defense, usury. Trial to
 the court, judgment for plaintiff, and defendants appeal.

57	359
84	361

Hough v. Hamlin.

George F. Boulton, for appellants.*Hand & Spriggs*, for appellee.

SEEVERS, J.—The note to secure which the mortgage given was executed by defendants, Comfort Hamlin and w

L USURY:
burden of
proof: evi-
dence.

The note was payable to C. B. Hamlin, or or
and he indorsed it to James Shaw, who indor
it to the plaintiff. The defendants claim
while the transaction between them and Shaw was in for
sale of the note and mortgage, it in fact was a loan of mo
The sale being a mere devise to evade the statute enacted
prevent usury, the burden to establish the defense is on
defendants. The arrangement with Shaw was made by C
Hamlin. They are the only material witnesses. Hamlin
tifies he applied to Shaw for a loan and that a sale of the
and mortgage was agreed upon to enable Shaw to obtain m
than ten per cent per annum. This is denied by Shaw and
testifies he purchased the note. There is no evidence wh
materially corroborates either of these witnesses. We can
therefore say the defense pleaded has been established. I
said the evidence of Shaw is equivocal and that he gave i
sponsive answers to the questions asked him. While this
be partially true as to some incidental matters, as to the m
question his testimony is of a positive character. We do
under the circumstances think we would be justified in say
he had committed perjury. The more charitable view sh
be adopted, that he and Hamlin understood the transac
differently. The defendants sought to prove by one Hech
Hatch, that Shaw had paid him the money instead of Ham
This evidence was rejected. It is said this is a circumsta
tending to show the usurious nature of the transaction.
think the evidence would not have had this tendency and
it was not material.

The witnesses had a mortgage on the premises and one

 Dupuy & Howell v. Sheak & Sharra.

et in getting the money was to pay such previous mortgage. It was, therefore, legitimate and proper to pay the money to him in liquidation of his mortgage and this was the expectation of both parties. It is not claimed that Hamlin did not get all the money over and above the previous incumbrances.

AFFIRMED.

DUPUY & HOWELL V. SHEAK & SHARRA.

Partnership: ACTION UNDER SECTIONS 3053 AND 3054. CODE. Where it is sought to reach the interest of a party in a partnership, the burden of proof is upon the plaintiff to show that the party is a member of the partnership; and where such fact is not established by the evidence, the appointment of a receiver to determine the value of his interest in the partnership is erroneous.

—: —: **GARNISHMENT.** Where a party simply represents his wife in the firm business, the partnership owes him nothing for services which can be reached by garnishment.

—: **SALE OF PERSONAL PROPERTY: FRAUD.** The sale of personal property by an insolvent debtor for a full consideration will not be set aside without proof that the purchaser participated in the fraudulent purpose.

Appeal from Mahaska District Court.

MONDAY, DECEMBER 12.

THE plaintiffs filed a petition alleging in substance that on the 21st of December, 1877, plaintiff recovered a judgment against J. H. Sheak for the sum of \$509.53, no part of which has been paid; that on the 19th of November, 1878, the plaintiff caused execution to issue on said judgment, which was served by garnishing Sheak & Sharra and Alexander Sharra; that said Sheak & Sharra were then, and are now, a firm composed of J. H. Sheak and Alexander Sharra; that since the organization of said firm Mrs. L. Sheak, the wife of J. H. Sheak, has been nominally a member of said firm, but J. H.

Dupuy & Howell v. Sheak & Sharra.

Sheak has been and is the real and actual partner; that the firm was organized a few weeks after the judgment was rendered against J. H. Sheak, in order to fraudulently defeat collection of said judgment, to fraudulently conceal the interest of J. H. Sheak in the firm and fraudulently hinder and delay his creditors; that the defendants, at the time of garnishment, and ever since that time, have been indebted to J. H. Sheak more than \$1,000, and the interest of J. H. Sheak in the firm amounts to more than \$1,000; that the property is in danger of being lost unless a receiver be appointed. Plaintiff prays that a receiver be appointed, that an accounting of the partnership matters be had, and that the partnership property be subjected to the plaintiff's judgment. The plaintiff filed an amendment to this petition alleging that an execution issued upon the judgment above referred to, which the sheriff levied upon certain oats, corn, wheat, rye, platform scales, office and fixtures, warehouse, and lots in Oskaloosa, all of which property was appraised at \$6,560.62; and that after said levy and inventory the sheriff returned said property to Sheak & Sharra, who claimed to own it; that the sheriff, by virtue of the execution, garnished Sheak & Sharra and Alexander Sheak; that Sheak & Sharra were then, and are now, indebted to J. H. Sheak, who is a member of the firm, more than \$1,000; that the property levied upon belonged to the firm of Sheak & Sharra, but they procured the ownership thereof in pursuance of the fraudulent scheme set forth in the original petition; that by virtue of the matters in the premises, the plaintiff required a lien upon the property levied upon as provided in section 3053 of the Code. The plaintiff prays the appointment of a receiver, and judgment as in the original petition. The defendants for answer deny that J. H. Sheak has, or ever had, any interest in the property in controversy. They allege that there is no surplus of assets of the firm after the payment of debts for division or distribution to any member of the firm, but that the firm is indebted to persons outside of the firm.

Ddpuv & Howell v. Sheak & Sharra.

nd to the said Sharra in a sum greater than the assets of the firm. They allege that the plaintiff, by continuously annoying and harrasing the firm by execution and garnishment, has sought to injure and impair its credit, so that it would be compelled to suspend business, and they ask that plaintiff be restrained by an injunction from such interference and annoyance.

A reply was filed to this answer denying its allegations on January 3, 1881, which was the day after the decree of the court was rendered.

On January 4, 1881, the court entered a decree finding that the defendant, L. Sheak, is only a nominal partner in the firm of Sheak & Sharra and that J. H. Sheak is the real party in interest, and is, as to the rights of the plaintiff, the real owner of one-half interest in the firm property and rights of the firm of Sheak & Sharra, subject to the rights of creditors, and the accounts of the partners for capital, and decreed that the interest in said firm property apparently owned and standing in the name of L. Sheak be subject to the payment of the plaintiff's judgment. The court further found that it was unable from the evidence to determine the value of the interest of J. H. Sheak in the property levied upon, or to strike a balance between the partners after settlement of the firm accounts and debts, and the court appointed R. P. Bolles a referee to ascertain the state of the partnership accounts and the value of the assets above the liabilities, and the respective accounts of the members of the firm, and also appointed said Bolles a receiver to take charge of and protect the interest of said J. H. Sheak.

On February 6, 1881, defendants appealed.

On April 19, 1881, plaintiffs appealed, asking that judgment be rendered in favor of plaintiff for the whole amount of plaintiff's judgment.

Williams & McMillen, for plaintiff.

John F. Lacy, for defendant.

Dupuy & Howell v. Sheak & Sharra.

DAY, J.—I. This proceeding is instituted under sections 3053 and 3054 of the Code to ascertain the interest of J. H. Sheak in the firm of Sheak & Sharra, and to subject that interest to the satisfaction of the plaintiff's judgment. The cause was submitted upon the testimony of Alexander Sharra and of J. H. Sheak alone. The evidence shows that J. H. Sheak was in business in the grain trade in Wray's elevator at the town of Oskaloosa, from 1873 to 1878, employing a capital of from \$3,000 to \$5,000, some of which was borrowed. During this time he lost all of his capital, and became indebted from \$3,000 to \$4,000. On December 21, 1877, the plaintiff recovered a judgment against J. H. Sheak for \$509.50. On January 12, 1878, L. Sheak, the wife of J. H. Sheak, and Alexander Sharra, her uncle, entered into articles of copartnership, as follows:

"This agreement, made and entered into by and between J. H. Sheak of the first part, and A. Sharra of the second part, witnesseth:

"1. That said parties do hereby form and enter into a partnership under the name and style of Sheak & Sharra, said business to consist in buying, shipping, and handling grain and produce, and a general produce business on commission or otherwise; said business to be conducted at Oskaloosa, Iowa, and at such other points as said firm may select.

"2. The profits and losses shall be shared mutually.

"3. Said Sharra is to furnish all the necessary funds wherewith to carry on said business, and is also to devote his time and energies to the prosecution of the business of said firm, and the said L. Sheak, being unable personally to attend to the transaction of said business, agrees to employ J. H. Sheak, or some other suitable person, to aid in carrying on the business, and agrees to pay said employe for his services in behalf of said firm. Said business will be entered upon immediately or as soon as the parties can get ready to do so. T

Dupuy & Howell v. Sheak & Sharra.

contract may terminate at any time at the instance of either party.

"L. SHEAK.

"ALEXANDER SHARRA.

"*January 12, 1878.*"

"So much of clause 3 in this article requiring the whole time of said Sharra is hereby annulled, and he will devote such time to the business of the firm as he may see proper.

"L. SHEAK.

"*December 19, 1878.*"

Under these articles of copartnership the firm commenced doing business in the Wray elevator, formerly occupied by J.

H. Sheak. Sharra put into the business \$1,254. Neither L. Sheak nor J. H. Sheak advanced anything. Both J. H. Sheak and A. Sharra testify that L. Sheak is the actual member of the firm, and that J. H. Sheak has no interest therein. The burden of proof is on the plaintiff to establish the fact that J. H. Sheak is, as alleged, a member of the firm. We feel constrained to hold that the evidence does not establish the fact. From the relation of the parties a court might guess that J. H. Sheak has some beneficial interest in the firm, but certainly such fact cannot be said to be established by the testimony.

Judgments of courts must be based upon evidence, and cannot be founded upon mere guess or conjectures. Mrs. L. Sheak had a right to become a member of a partnership and to employ her husband to conduct the business for her notwithstanding his insolvency. Whatever the moral obligation of J. H. Sheak may have been, he was under no legal obligation to engage in business for the benefit of his creditors. It is not probable that Sharra would have been willing to invest his means in business with a partner so largely insolvent. He certainly had a right to refuse such a partnership, and it is not competent for the court, without proof, to infer that he entered into such a partnership. If J. H. Sheak had put his

PARTNERSHIP: action under §§ 3053 and 3054, code.

 Dupuy & Howell v. Sheak & Sharra.

property into the business under cover of his wife's name. A very different question would be presented. But the evidence is clear that neither J. H. Sheak nor his wife put anything into the business, except as indicated in the fourth point of this opinion. It appears from the evidence that J. H. Sheak would have been the partner in place of his wife if he had not been embarrassed. But as we have before intimated, he had a right to decline becoming a partner, and he cannot be held a partner simply because he would have been one if his financial condition had been different. The court erred in holding from the evidence that J. H. Sheak was the actual partner in the firm of Sheak & Sharra.

II. Even if the court was correct in holding that J. H. Sheak was an actual partner in the firm of Sheak & Sharra, still the decree of the court is wrong. The only money put into the business was \$1,254, put in by Sharra. The evidence shows that the business was largely conducted by advances made by commission merchants. As soon as a shipment of grain was made the firm was in the habit of drawing upon the bill of lading almost to its full value. The firm was in debt to about the full amount of the assets, so that, as the evidence shows, after allowing Sharra the amount advanced by him, and charging to the other member of the firm the amount drawn out, nothing would remain to the share of Sheak. Instead of appointing a referee to ascertain Sheak's interest, the court should have found upon the evidence submitted that upon a division of partnership assets there would have been nothing for his share.

III. The evidence shows that J. H. Sheak was not employed by the firm, but that he represented his wife in the business of the firm. The firm is not indebted to him by garnishment. for services any more than it would have been to Mrs. L. Sheak if she in person had assumed the management of the firm's business. Under the articles of copartnership it was her duty to employ a suitable person to aid in carrying

Dupuy & Howell v. Sheak & Sharra.

on the business of the firm. There is no debt due J. H. Sheak, so far as the evidence shows, which can be reached under the process of garnishment.

IV. It is claimed that the plaintiff is entitled to judgment on the ground of fraud. At the time of the formation of the partnership J. H. Sheak had horses, safe, and furniture used in the elevator valued at \$341.50, which he sold to Sharra. Sharra paid part of the price down and the balance between February and March, 1878. It is claimed that this transaction was in fraud of creditors and that on this ground plaintiff is entitled to relief. There is no allegation in the pleadings which will justify the setting aside of the sale of property to Sharra as fraudulent. Besides, the evidence shows that Sharra paid a full consideration for this property. The sale cannot, therefore, be set aside without proof that he participated in a fraudulent purpose to place this property beyond the reach of creditors. The evidence does not justify such finding.

V. The defendants claim that the plaintiff should be enjoined from further annoyance of the defendants, upon the ground that no reply was filed to the answer until after the decree was entered, and that its affirmative allegations are, therefore, admitted. This point is merely suggested and does not seem to be relied on very confidently. A judicial decision that J. H. Sheak is not a member of the firm will afford full protection to the firm against annoyance upon his account, and render interposition by injunction unnecessary. Upon plaintiff's appeal

AFFIRMED.

Upon defendant's appeal

REVERSED.

Brockway v. Haller.

BROCKWAY V. HALLER.

1. **Interest:** CONTRACT FOR: PLEADING. Where a party set up a parol contract to pay ten per cent interest but only claimed six per cent, it was held that ten per cent included six per cent, and that plaintiff could declare on an express parol contract to pay ten per cent interest, as creating a liability to pay six per cent, and recover thereon.

Appeal from Montgomery Circuit Court.

MONDAY, DECEMBER 12.

ACTION to recover for interest alleged to be due upon delinquent interest upon a promissory note. The petition shows that the note was drawn bearing ten per cent interest per annum; that after the note became due the parties entered into an agreement for an extension; that in consideration of the extension the defendant agreed to pay ten per cent interest and pay it annually; and in case of failure to pay the interest when due to pay ten per cent interest on the delinquent interest. The plaintiff claims to recover, however, only six per cent interest on the delinquent interest. The petition shows that the amount due as interest on the delinquent interest computed at six per cent is \$112.81. He therefore prays judgment for that amount.

To the petition the defendant filed a demurrer in the following words:

"1. Plaintiff sets up and seeks to recover under a special parol contract for the payment of ten per cent annual interest on money loaned.

"2. He seeks to recover money claimed under and by virtue of a special parol contract made by defendant for the payment of ten per cent interest on unpaid interest, on money heretofore loaned by plaintiff to defendant."

The court sustained the demurrer, and the plaintiff elected to stand upon his petition, judgment was rendered for the defendant. The plaintiff appeals.

 Brockway v. Haller.

C. E. Richards and *W. E. Strawn*, for appellant.

Miller & Bartholomew, for appellee.

ADAMS, CH. J.—Interest in this State is limited to six per cent per annum. To this rule there is one exception. Parties may agree in writing for the payment of interest not exceeding ten per cent per annum. Code, section 2077. The agreement in this case to pay ten per cent interest on the delinquent interest not being in writing, such interest cannot of course be recovered. The plaintiff therefore seeks to recover six per cent. The defendant contends that he cannot recover even that. His theory is that a contract to pay ten per cent is not a contract to pay six per cent, and as no other than the ten per cent contract is relied upon the plaintiff must fail.

But ten per cent includes six per cent. If the plaintiff had brought an action to recover six per cent on a written contract to pay ten per cent, his recovery could not be denied. The written ten per cent contract would have been good enough evidence of the defendant's liability to pay six per cent. For the same reason a parol contract to pay ten per cent shows a liability to pay six per cent. If a parol contract to pay ten per cent were illegal the case would be different. But it is simply insufficient to enable the claimant to enforce a ten per cent liability.

The defendant contends that we cannot regard the ten per cent contract as including a contract to pay six per cent, because the law implies a contract to pay six per cent from the agreement to pay the interest annually. But parties may ever by express contract what the law would otherwise imply, and in such case it is proper to declare upon the express contract. We see no objection to the plaintiffs declaring on the express contract to pay ten per cent, as including a contract to pay six per cent and as creating a liability for that amount.

Pilgrim v. Pilgrim.

Any other view would be extremely technical, and operate to defeat substantial justice. We think that the demurrer is improperly sustained.

REVERSE

PILGRIM V. PILGRIM.

1. **DIVORCE: WILLFUL DESERTION.** Where the evidence is sufficient to constitute willful desertion, and absence without reasonable cause for more than two years, a decree of divorce should be granted.

Appeal from Muscatine Circuit Court.

MONDAY, DECEMBER 12.

ACTION for divorce on the ground of desertion. The defendant denied that she deserted the plaintiff. On the other hand, by cross petition, she averred that the plaintiff deserted her, and she prayed for a decree of divorce in her favor, and for \$5,000 as alimony. The court dismissed both the plaintiff's petition and the defendant's cross-petition. Both parties appealed, the plaintiff perfecting his appeal first.

Cloud & Cloud, for appellant.

Hoffman, Pickler & Brown, for appellee.

ADAMS, CH. J.—The plaintiff is a farmer in easy circumstances, between sixty and seventy years of age and resides in Muscatine county of Muscatine. He was at the time of his marriage, July, 1878, a widower. His housekeeper appears to have been a daughter, Kate Pilgrim, about fifty years of age. The parties were married in the city of Muscatine. On the evening of the day of their marriage they went to the plaintiff's residence, which was about seven miles from the defendant's. The defendant that night did not occupy a bed with her husband, but slept with the daughter Kate. In the morning, both

Pilgrim v. Pilgrim.

breakfast, she left and returned to Muscatine, and never lived with the plaintiff afterward. The parties met two or three times afterward and had some talk in regard to her return, and she did once return but did not remain. The ostensible cause of her leaving on the morning after her marriage was the dissatisfaction expressed by Kate. Her dissatisfaction was expressed both by language and tears, though it appears that she said but little, and her language was characterized by entire civility. The plaintiff treated the defendant with kindness, and expressed the hope that the daughter would become reconciled. The defendant claims that she left for a mere temporary absence, and as an expedient to enable her husband the better to reconcile his daughter; that she was willing to return, but was not allowed to do so. In our opinion the evidence does not sustain her claim.

The defendant is greatly the plaintiff's junior, and the undisputed evidence is that she married him with great hesitation. She objected to his age, his looks, and his children. After having promised to marry him she refused to do so as late as the morning of the day she was married. After she was married and was about starting to go to her husband's residence, she stated to the woman in whose house she was married that she should return soon. She also stated to her, if the testimony of the woman is to be believed, that she would not sleep with her husband that night. The defendant denies that she so stated, but her conduct was such as to incline us to believe that she did. No conviction upon her part as to the expediency of her leaving her husband's house could possibly excuse the indecent haste with which she left it. Whether she had formed the determination before she left Muscatine not to cohabit with her husband is not very material. It is certain that she did not cohabit with him, and we think that it was her fault. On this point the testimony of the plaintiff and defendant are directly in conflict, but the plaintiff's is more consistent with all the proven facts of the case. In refusing, as we think she did, to

Marshall County v. Hanna.

occupy her husband's bed, and in leaving his house the next morning before breakfast, we think that she willfully deserted him.

Did she absent herself without reasonable cause for two years? We think that she did. She claims that she absented herself through her husband's fault. But, according to the preponderance of the evidence, he asked her to return and she refused. It is undisputed that when he offered to shake hands with her she refused, and when he sought to address her she insultingly turned her back toward him.

She testifies, to be sure, that she offered to return, and that it was understood between them that she was to return as soon as he could reconcile the children, and that he was to let her know when they were reconciled, and take her home, which he failed to do. But this is not consistent with her previous conduct.

In our opinion the plaintiff is entitled to a decree as prayed for. Upon the defendant's appeal the judgment is affirmed, and upon the plaintiff's appeal it is

REVERSED.

MARSHALL COUNTY V. HANNA ET AL.

1. **Administrator: ASSIGNMENT OF NOTES.** An administrator has power to dispose, by assignment, of the notes and due bills of the decedent, and in the absence of proof to the contrary it will be presumed that power was rightfully exercised, and that the assignee took them bona fide.
2. **—: —: COUNTY MAY TAKE.** A county has the legal capacity under some circumstances to take notes by assignment. The burden showing lack of authority in any case is upon the one denying it, and unless established it will not avail by way of abatement of an action.

Appeal from Story District Court.

MONDAY, DECEMBER 12.

THE plaintiff commenced this action on the 3d day of M

Marshall County v. Hanna.

1877, against Fred Baum, claiming \$1,000 on six due bills and one promissory note executed by Fred Baum to H. A. Gerhart, and alleging that George Glick, administrator of H. A. Gerhart's estate, assigned and transferred in writing said due bills and note to the plaintiff. Afterward an amendment to the petition was filed averring the death of Fred Baum, and that Thomas B. Hanna and Rachel D. Baum are administrator and administratrix of his estate.

The defendants answered, admitting that they are the administrator and administratrix of the estate of Fred Baum, deceased, and admitting the execution of the note and due bills sued upon to H. A. Gerhart, deceased. The defendants pleaded an abatement of the action, as follows:

"Defendants deny the plaintiff is the owner of said notes, nor entitled to recover thereon, but aver that the notes are the property of George Glick, as administrator of H. A. Gerhart, deceased, who died intestate March 8th, 1876. That plaintiff is a municipal corporation, and has never purchased, nor has it authority or power to purchase, said notes, or the right to sue thereon.

"That said administrator (Geo. Glick), without any consideration, pretended to assign said notes to plaintiff, who paid nothing for the same.

"That said plaintiff acquired no right to said notes in any form, and has wrongfully brought suit in its own name.

"That plaintiff filed no claim against the estate of H. A. Gerhart, deceased, nor has any been allowed; and more than four years has elapsed since Geo. Glick was appointed administrator of the estate of H. A. Gerhart, deceased, by the probate court of Marshall county, Iowa. And this suit was brought by plaintiff, not a party in interest, to vex and harass said Fred Baum."

The cause was tried to the court, and judgment was rendered in favor of plaintiff for the full amount of the claims sued upon. The defendants appeal. The facts are stated in the opinion.

Marshall County v. Hanna.

Brown & Binford, for the appellants.

O. Caswell, for the appellee.

DAY, J.—The cause came on to be heard at the February term, 1881. The plaintiff offered in evidence the due bills and notes, with an assignment thereon as follows: "I hereby assign and transfer to Marshall county, notes and due bills No. * * * to be owned and collected by said county, and the amount of money collected thereon to be applied in payment of the indebtedness due said county from I. A. Gerhart, deceased, late treasurer, after deducting therefrom the costs and expenses of collecting said notes and due bills being the evidence of moneys taken out of the treasury of Marshall county, as is supposed.

GEO. GLICK,

Adm'r of estate of H. A. Gerhart."

"*State of Iowa, Marshall County:* It is ordered by the court that the above and foregoing assignments to Marshall county, are this day expressly approved, the 2d day of April, 1880.

C. H. BROCK, *Clerk.*"

To the introduction of the due bills and notes, and the assignments, the defendants objected as follows:

"1. The said plaintiff had no power to purchase, and said George Glick had no power to sell, said notes, as administrator, in the manner shown by the assignment.

"2. The assignments show the sale was without consideration.

"3. Said assignments amount to no more than the turning out by an administrator notes held by him, as such, to a supposed creditor.

"4. An administrator can only sell notes and bills for cash after appraisement. The plaintiff has no power to buy notes and bills, or receive them for collection."

The court overruled these objections, and admitted the evidence, to which the defendants excepted.

I. It is insisted that the administrator had no authority

Marshall County v. Hanna.

assign the notes and due bills. In Williams on Executors, page 932 it is said: "It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is, that the executor or administrator *must* sell, in order to perform his duty in paying debts, etc.; and no one would deal with an executor or administrator, if liable afterwards to be called to account." That the administrator had authority to assign the note and bills, see *Thomas v. Reister*, 3 Porter (Ind.), 369; *Gray v. Thomas*, 6 Ind. Eq., 74; *Bradshaw v. Simpson*, Id., 243; *Hough v. Bailey*, 32 Conn., 288; *Makepeace v. Moore*, 10 Ill., 474. In *Hough v. Bailey*, *supra*, it is said if the administrator dispose of a note improperly, this might render him liable on his bond, but would not affect the title of his *bona fide* assignee. The defendant does not deny liability upon the notes, but pleads certain facts in abatement of the plaintiff's right of action. The burden of establishing these facts is upon the defendant. The executor had a general power to dispose of the note and due bills. In the absence of any showing to the contrary, it is presumed that this power was rightfully exercised. Even if the administrator transferred them improperly, still if the plaintiff took them *bona fide* it acquired a good title, and the executor is liable upon his bond. The defendant does not show that the plaintiff did not take the evidences of indebtedness *bona fide*. Hence, the action ought not to abate on account of the lack of authority of the executor to make the transfer.

II. It is insisted that the county has no legal capacity to take the notes and due bills by assignment. It cannot be denied, however, that under some circumstances a county may take. The case of *Shankland v. Commissioners of Madison County*, 21 Ohio,

Robertson v. The Central Railway Company.

573, recognizes this doctrine, and is a case in very many respects like the present. As between the plaintiff and this defendant the authority of the plaintiff to take by assignment must be presumed until the contrary is shown. The defendant insists upon the lack of authority by way of abatement of the action. The burden of proof is upon him to establish it. This he has not done. This renders unnecessary a consideration of the sufficiency of the evidence admitted to show that the notes were turned over to the county in consideration of the defalcation of Gerhart.

III. It is insisted that the claim in favor of the county against Gerhart was never filed or proved, and that it is barred by statute of limitations against the administrator. This is a matter which does not concern this defendant. He is liable on some one upon the claims sued on. This he does not deny. If the administrator wrongfully assigned the claims in satisfaction of a debt upon which the estate was not liable, this is a matter to be settled between the administrator and the creditors or heirs of the estate.

We see no reason for disturbing the judgment.

AFFIRMED.

ROBERTSON V. THE CENTRAL RAILWAY CO.

1. **Railroads: TRESPASS: RIGHT OF WAY.** Where the petition embraced two causes of action, damages for the trespass and for the right of way taken, and an offer of compromise was made and accepted in the case, both claims were thereby settled and adjusted.
2. —: **COMPROMISE: DEED FOR RIGHT OF WAY.** Under the pleading the compromise stood in place of the judgment of a court, and upon payment of the amount agreed upon the defendant had the right to demand a deed for the right of way, and the court had jurisdiction to order the deed executed.
3. —: **PRACTICE.** The appointment of a commissioner to execute the deed for the right of way, upon the tender of the amount agreed upon therefor, without giving the party a reasonable time in which to execute it, if irregular, worked no prejudice, and affords no ground for reversal.

Robertson v. The Central Railway Company.

Appeal from Marshall District Court.

MONDAY, DECEMBER 12.

ON the 20th day of May, 1880, the plaintiff filed in the Marshall District Court his petition, in substance alleging that he is the owner of a certain quarter section of land, and that on the 14th day of June, 1867, the Eldora Railroad and Coal Company, being desirous of procuring a right of way over said premises, caused the appointment of a sheriff's jury, which assessed the plaintiff's damages at ten dollars, which sum said company deposited with the sheriff; that on the 28th day of June, 1867, the plaintiff appealed from said assessment to the District Court of Hardin county, in which, on the 11th of June, 1870, judgment was rendered in favor of plaintiff against the Eldora Railroad and Coal Company for the sum of \$220 with interest at 6 per cent, together with costs, taxed at \$41.35; that soon after the rendition of said judgment the Eldora Railroad and Coal Company was dissolved and merged in a new one, called The Iowa Valley Railroad Company, which succeeded to the property of the Eldora Railroad and Coal Company, including its track and line over plaintiff's land; and afterward, about the year 1870, the said Iowa Valley Railroad Company was dissolved and merged in the Central Railroad Company of Iowa, which succeeded to all the property of the Iowa Valley Railroad Company; that afterwards a mortgage executed by the Iowa Central Railroad Company was foreclosed, and under decree the property was sold to the trustees of the bondholders, who subsequently formed a new company under the name of the defendant herein, and the defendant took possession of all the property of the said Central Railroad Company of Iowa; that the said companies have had possession of that part of the land of plaintiff over which the railway track of said defendant runs since June 11th, 1870; that no part of said judgment has been paid, and that plaintiff has never con-

Robertson v. The Central Railway Company.

veyed any right of way over said land to defendant or any said railroad companies. The petition then proceeds as follows: "Yet, nevertheless, your petitioner is willing to convey to defendant right of way over said lands upon payment of the judgment herein before mentioned, and the interest thereon and the costs of said suit, or such sum as may herein be adjudged to your petitioner in this or any other lawful proceeding for the purpose of ascertaining the amount thereof. Petitioner further states that said defendant is a mere trespasser upon the said lands of your petitioner, and its use and occupation by said defendant has been a continuous usurpation and trespass since defendant took possession of the same, and that your petitioner has been thereby greatly damaged, to-wit, the sum of \$1,000. Wherefore, petitioner prays the court that upon the final hearing of this cause the court will order to adjudge and decree that the defendant is and has been, since June 17th, 1879, a trespasser upon the said property of your petitioner; that its use and occupation of the said lands of your petitioner is a usurpation without right or authority of law; that defendant shall pay your petitioner the damages sustained by him by reason of said trespass and usurpation, and for right of way over said lands, the sum of \$1,000, within a reasonable time to be fixed by the court; and that your petitioner have execution for such sum as shall be found as damages to your petitioner for said trespass and usurpation; and that in default of payment of such sum as the court shall adjudge to be the value of the right of way over and through your petitioner's said lands, that the defendant be perpetually enjoined from further and other occupation and use of said lands or any part thereof; that defendant pay the costs of this suit, and that the court will grant such other and further relief as is consistent with equity and good conscience." The defendant answered, alleging payment of the assessment of the sheriff's jury and dedication of the right of way by plaintiff, and pleading an acquittal. On the 26th of November, 1880, the defendant served

Robertson v. The Central Railway Company.

plaintiff's attorney, an offer of compromise, as follows: to Anthony Robertson: The Central Iowa Railway Company hereby offers, as provided by the Code, to compromise cause pending in the District Court of Marshall county, Iowa, in which you are plaintiff and it is defendant, by allowing judgment to be taken against said defendant for two hundred dollars and costs."

On the 30th day of November, 1880, the plaintiff caused to be served on the attorneys of the defendant an acceptance of offer of compromise, as follows: "To the above named defendant: Your offer of compromise allowing plaintiff to take judgment against you for two hundred dollars and costs in the above entitled cause is hereby accepted, this the 30th day of November, A. D. 1880."

ANTHONY ROBERTSON, *plaintiff*.

On December 13th, 1880, the plaintiff filed in court the foregoing offer and acceptance of compromise. On January 13th, 1881, the court entered a judgment and decree reciting the foregoing facts as apparent from the pleadings and the offer and acceptance of compromise, and then proceeding as follows: "And it further appearing to the court that thereupon defendant tendered and offered the said sum of two hundred dollars, interest from November 26th, and costs \$206, and requested a deed of right of way and tendered, and same was refused, and defendant now tenders said sum, interest and costs \$206, on condition of a conveyance, as contemplated in the petition, which is again refused by the plaintiff upon the ground that he is under no obligation to make said conveyance on reason of acceptance of said offer of compromise. The deed duly written tendered plaintiff is hereto annexed. Thereupon it is ordered and decreed that C. E. Boardman is appointed a commissioner to make said conveyance, as provided by the Code, the same to be submitted to this court for approval; that the plaintiff have judgment against the defendant for two hundred dollars and six per cent interest from November 26, 1880,

Robertson v. The Central Railway Company.

and the costs of this suit taxed at ——— dollars, except cost of commissioner's deed, which are taxed to plaintiff at \$3.00.

The commissioner thereupon executed to the defendant a deed purporting to convey to defendant the right of way over plaintiff's land, one hundred feet wide along the line of railroad as now laid, which deed the court approved. The plaintiff thereupon filed a motion to set aside said decree and deed, which motion the court overruled.

Subsequently all that part of the decree purporting to tax three dollars to the plaintiff for deed of commissioner, was stricken out, the defendant having requested the same removed. The plaintiff appeals.

Henderson & Carney, for the appellant.

H. E. J. Boardman and *A. C. Daly*, for appellee.

DAY, J.—I. It is insisted by the appellant that the petition, although in form of a bill in equity, is to recover damages for a trespass only; that the prayer is framed with the pleader's eye on section 1257 of the Code, and that the compromise related only to the claim of damages for the trespass, and had no reference to the compensation to be made for right of way. These positions are not tenable. The petition prays both specific and general equitable relief. The plaintiff does not ask that judgment should be entered as in an ordinary law action, but prays that the court will order, adjudge and decree that the defendant is, and has been since June 17, 1879, a trespasser upon said property, etc. The claim is not confined to the damages arising from the trespass simply, but the plaintiff prays that the court "order, adjudge and decree, * * * that defendant shall pay your petitioner the damages sustained by him on reason of said trespass and usurpation, and for right of way over said lands the sum of \$1,000." It is very clear from the petition that the plaintiff sought some order from the court

1. RAIL-
ROADS: tres-
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way.

Robertson v. The Central Railway Company.

which would require the defendant to pay for the trespasses committed since June 17, 1879, as well as for the right of way which had been in the possession of the defendant and its predecessors since June 11, 1870.

The cause of plaintiff embraced these two claims, and when the offer of defendant to compromise the cause by permitting judgment to go against it for \$200 and costs was accepted, both claims were satisfied and adjusted. It seems to me that a proper construction of the petition can have no reasonable doubt upon this question. The claim of the plaintiff is unjust and unreasonable. It cannot be supposed that the defendant for less than a year's occupation of a strip of land one hundred feet wide, across a quarter section of land, amounting to about six acres, agreed to pay \$200, when the value of the land entire was assessed upon appeal at \$220.

I. It is further claimed that there is no issue in the case preventing the court to decree a deed to the defendant. It is said the defendant did not ask such relief. But the plaintiff alleges in his petition that he is willing to convey to defendant right of way over said lands upon payment of such sum as may herein be adjudged to petitioner. It was not necessary that the defendant should specifically demand what the plaintiff expressed a willingness to concede. The offer of compromise, it must be supposed, was made with direct reference to this statement in the plaintiff's petition. When the parties, by their agreement, determined the amount which should be paid, their determination stood in place of the judgment of the court, and upon payment of the sum agreed upon, the defendant had a right to demand that the plaintiff would do that which he expressed a willingness to do.

II. It is claimed that under section 1257 of the Code, no judgment can be rendered except for costs, and that therefore the court had no jurisdiction to order a deed. Section 1257, however, applies to the trial of an appeal from the assessment of the sheriff's jury, which this case is not.

Robertson v. The Central Railway Company.

IV. It is urged in the motion to set aside the deed, there was no testimony to show that defendant had tendered money to plaintiff, and that plaintiff had refused to execute a deed, and that if such were the fact the court could not arbitrarily make a deed through a commissioner without giving the plaintiff a reasonable time to execute it. The decree recites that defendant tendered \$206 costs, and requested a deed, and that plaintiff refused, on ground that he was under no obligation to make a conveyance. There is nothing in the record to show that this recital is correct, and, in the absence of any showing, its correctness may be presumed. Upon payment for the right of way the defendant became entitled to it absolutely. Even if it was irregular for the court to appoint a commissioner to execute a deed without giving the plaintiff a reasonable time in which to execute it, yet as the commissioner's deed was executed without cost to the plaintiff, the irregularity worked him no injury. We see no reason for disturbing the order of the court below.

V. The plaintiff submitted with the case a motion to strike from appellee's amended abstract the last two lines on the first page, and the first nine lines and the first four words in the tenth line of the second page. This matter does not appear to have been embraced in the record in any proper manner, and it is altogether immaterial to a proper determination of the case. It is therefore stricken out, and no costs will be allowed therefor.

AFFIRMED.

Kelsey v. Kelsey.

KELSEY V. KELSEY ET AL.

Will: ACTION TO CONSTRUER: GUARDIAN AD LITEM. Where an action was brought to construe and enforce a will and the guardian *ad litem* of a minor legatee filed a cross-petition directly attacking its validity it will be regarded as made in an original action, contemplated by section 2353, Code; and the guardian *ad litem* in such an action can lawfully interpose the question of the invalidity of the will.

—: PRACTICE. Where the judgment of the court below accords with the preponderance of the testimony it will not be disturbed.

Appeal from Monona Circuit Court.

TUESDAY, DECEMBER 13.

THIS is a proceeding in the Circuit Court as a court of probate instituted by the executor to obtain, by an order of the court, an interpretation of the will of the testator. The defendant, Hattie G. Kelsey, an infant daughter of the testator, and a legatee under the will, by a guardian *ad litem*, answered the petition of plaintiff and filed a cross-bill in the proceeding. An order was made after the trial upon the merits, dismissing plaintiff's petition and setting aside the probate of the will, and annulling the will itself. The plaintiff appeals. The facts of the case appear in the opinion.

Joy & Wright, for appellant.

G. W. McMillan, for appellee.

BECK, J.—I. The petition shows that plaintiff is the executor appointed by the will of James M. Kelsey, deceased, which was duly admitted to probate in the Circuit Court wherein this proceeding was had. The will bequeaths a legacy of \$5,000 to the wife of deceased, who died before the death of the testator, and \$4,000 to Hattie G. Kelsey, an infant, his only child. All the remaining estate, under the interpretation of the will which plaintiff prays may be adopted by the court, was given to plaintiff, a brother of the testator, and to his

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Kelsey v. Kelsey.

father. The court appointed a guardian *ad litem* for defendant Hattie, who answered the petition, setting up defense to the proceeding which need not be here recited. He also filed a cross-petition, alleging, among other things, that when the will was admitted to probate Hattie was an infant of ten years, and a defense to the proceedings on the part of his grandfather was prevented by the undue haste with which they were conducted. It further alleges that the testator, when the will was executed, was not of sound mind and was wholly incapable of attending to ordinary business affairs; that the execution of the instrument was procured by the undue influence and fraud of plaintiff, and that the property of his estate is of the value of \$20,000, all of which, under the will as interpreted by plaintiff, except \$1,000 devised to his only child Hattie, is set apart to plaintiff and his father. The defendant prays that the will may be declared void and of no effect.

II. The counsel for plaintiff insist that the Circuit Court had no authority in this proceeding to determine the invalidity of the will, and that the guardian *ad litem* was not authorized to put that question in issue in this case.

Under Code, section 2353, a will, after probate thereof, may be set aside by an original or appellate proceeding in a proper case assailing the validity of the instrument. *Leighton Orr*, 44 Iowa, 679. But counsel for plaintiff maintain that this is not an original proceeding contemplated by the statute.

The action is surely an original proceeding. This is not denied, but it is claimed that its purpose is to construe the will. This is certainly true so far as the relief claimed by plaintiff is concerned. But in this, as in all other actions, the defendant may plead as a defense whatever may defeat the claim of the plaintiff for relief. It is the policy of the law to settle the controversies of litigants without the unnecessary multiplication of suits. Hence, if in one action all the rights of the parties may be determined, it will be done with

not requiring other suits to be instituted. In harmony with this policy, liberal statutes provide that counter-claims, cross-petitions and equitable answers may be filed, presenting every ground of defense to recovery recognized by the law. In this case defendant sets up in the cross-petition that the will is invalid because of the insanity of the testator. The cross-petition assails the will, not in a collateral way, but by a direct attack. It must be regarded, therefore, as being made in an original action, contemplated by Code, section 2353, above cited.

III. Counsel for plaintiff insist that the guardian *ad litem* is not authorized to set up the invalidity of the will as a defense to the action. The ground of this position is that under Code, section 2565, a minor must prosecute an action by his guardian or next friend, and that the powers of a guardian *ad litem* are limited by section 2566 to the defense of actions instituted against the minor.

We have seen that a defendant to an action may interpose as a defense any matter which will defeat the plaintiff's right to recover. A guardian *ad litem* is not restricted by the statute to pleading certain defenses and forbidden to make others. He is authorized to defend the action and may set up any matter that will defeat it. While the invalidity of the will is set up in this action by a cross-petition, it is nevertheless pleaded as a defense. We reach the conclusion that it was lawfully interposed by the guardian *ad litem*.

IV. This brings us to consider the merits of the case as presented by the record. The court below found that the will was invalid. While the record does not state the ground of the court's decision, we are warranted in the conclusion that it was the insanity of the testator. Upon this question of fact there was a conflict in the testimony. The case is not triable here *de novo*. *Leighton v. Orr*, 44 Iowa, 679. We cannot, therefore, under the often repeated rules of this court, disturb the judgment of the court below. It is not improper

Kline v. Kline.

for us to remark that the judgment of the Circuit Court accords with the preponderance of the testimony which satisfactorily shows that the testator, when he executed the will, was insane. His mental disorder was clearly indicated by his acts, appearance and conversation. While he probably grew better, after being taken by plaintiff to his father's house in New Hampshire, yet upon his return to his home in Iowa his malady seems to have returned, and in less than a year after the execution of the will he destroyed his life with his own hand.

The foregoing discussion covers all points presented by counsel in their printed argument. It is our opinion that the judgment of the Circuit Court ought to be

AFFIRMED.

KLINE ET AL. V. KLINE ET AL.

1. **Habeas Corpus: PRACTICE.** This proceeding being regarded as an action at law, the court can only interfere where the finding be manifestly unsupported by the evidence.
2. **Divorce: JURISDICTION: CUSTODY OF CHILDREN.** A decree of divorce rendered in the State of Wisconsin, on service by publication, so far as it attempted to fix the custody of the minor children who were residents of the State of Iowa, is without jurisdiction and void.

Appeal from Linn District Court.

TUESDAY, DECEMBER 13.

THIS is a proceeding in *habeas corpus*, by which Joseph Kline, a resident of the State of Wisconsin, sought to recover the custody and control of Anna M. Kline and Alice Kline, his minor children. Upon a trial the court refused to make the order prayed for, and Joseph Kline appeals.

Frank G. Clark, for appellants.

No appearance for appellees.

57	385
85	218
57	383
100	333
100	402
57	386
123	06
57	385
129	342

ROTHROCK, J.—The father and mother of said minor child-
 were married in the State of Wisconsin, in the year 1870.
 They lived together as husband and wife until
 June, 1874, when they separated, and the mother,
 Anna Kline, now Anna Umphrey, came into this State and
 brought with her the two children, the issue of said marriage,
 and they have resided in this State continuously since that
 time, said children being now eight and ten years of age. In
 November, 1876, Joseph Kline, the father, procured a decree
 of divorce in the State of Wisconsin, upon the ground of de-
 fect of consent. There was no personal service of notice of the ac-
 tion upon Anna Kline. The service was by publication, ac-
 cording to the laws of that State. It does not appear that she
 had any knowledge whatever of said divorce proceedings until
 after the decree. The decree, in addition to divorcing the par-
 ties, awarded the care, custody, and control of the children to
 the father.

This proceeding was commenced in February, 1881, and it
 appears from the evidence that the father has not married since
 the divorce. The mother removed to the city of Cedar Rapids
 with her children in the year 1876, and shortly after her re-
 arrival she married the defendant, Umphrey. The children are
 well provided for. A teacher in one of the public schools tes-
 tified that for two or three years past they have attended the
 school taught by her, and that "they are comfortably dressed,
 and, from their appearance, well treated. Their attendance has
 been very regular, and they are intelligent and well-behaved,
 and seem healthy." We think the disposition of the case made
 by the learned district judge was fully warranted under the
 circumstances. At least, as this proceeding is regarded as an action
 in equity, we can only interfere where the finding is manifestly
 unsupported by evidence. *Shaw v. Nachtwey*, 43 Iowa, 563;
Embrey v. Keene, 47 Id., 435; *Jennings v. Jennings*, 56 Id.,
 38.

But it is urged that the father is entitled to the custody of

Kline v. Kline.

the children by virtue of the Wisconsin decree. The general rule, as claimed by counsel for appellant, that domicile for the wife and children is the domicile of the husband and father, is, no doubt, correct. From this it is argued that the Circuit Court in Wisconsin had complete jurisdiction of all the parties, and that the decree awarding the custody of the children to the father is entitled to full faith and credit in this State. [But the rule intended for is subject to the exception that in proceedings for divorce in most, if not all, the States, the law recognizes husband and wife as having separate domiciles, and a divorce may be decreed in the State where only one of the parties reside.] A suit for divorce in its nature makes the husband and wife opposite and contending parties, and the legal fiction of a unity of person and of domicile by reason of the marriage is destroyed by the law which authorizes the action. Such is the fact in this case. The husband procured his decree of divorce by publication after the wife, with the two children, had been residents of this State for more than two years.

Under the circumstances, we think the better rule is that the court in Wisconsin had jurisdiction to declare the *status* of the parties before it and grant the divorce, but that the decree in excess of this was void for want of jurisdiction. Suppose that a husband should desert his wife and remove to another State, taking his property with him, and she should make application for a divorce and alimony, and make service by publication, and take her decree without any appearance of the defendant,—no one would claim that a money judgment for alimony could be enforced in such case in a foreign jurisdiction. And yet, in a certain sense, the court has jurisdiction of the defendant, but it is only for the purpose of changing the *status* of the complaining party and terminating the marriage.

[We think it logically follows that, where the minor children are non-residents of the State where the divorce proceeds,

Kilne v. Kilne.

are had, that the court acquires no jurisdiction as to their custody, simply because the decree can have no extra-territorial force or effect.] In Cooley's Constitutional Limitations, p. 404, it is said: "The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage, and it might be sufficient, also, to empower the court to pass upon the question of the custody of the children of the marriage, if they were within the jurisdiction; if they acquire a domicile in another State or country the judicial tribunals of that State or country would have authority to determine the question of their guardianship there."

In *Woodworth v. Spring*, 4 Allen, 321, it is said: "Every sovereignty exercises the right of determining the *status* or condition of persons found within its jurisdiction. The laws of a foreign State cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government. * * * The question whether a person within the jurisdiction of a State can be removed therefrom depends, not on the laws of the place whence he came, or in which he may have had his domicile, but on his rights or obligations as they are fixed and determined by the law of the State or country in which he is found."

In our opinion the decree, so far as it attempted to fix the custody of the children, was without jurisdiction in the first instance. Want of jurisdiction is a matter which may always be interposed against an adjudication when sought to be enforced, or when any benefit is claimed for it. The want of jurisdiction either of the subject-matter or of the person of either party renders a judgment a mere nullity. The authorities which we have cited go even farther than this, and in effect hold that if there was jurisdiction to award the custody and control of the children of the marriage to one of the parties, by reason of the children being at the time within the jurisdiction of the

Shaw v. Kendig.

court, yet that such a decree is without force in a foreign jurisdiction into which the children may be afterwards removed.

AFFIRMED.

57	390
79	512

SHAW v. KENDIG.

1. **Justice of the Peace: FEES.** A justice of the peace is entitled to a trial fee in default cases, and in cases coming under sections 33542, Code, he is authorized to charge both a trial fee and a fee for entering judgment by default.

Appeal from Madison Circuit Court.

TUESDAY, DECEMBER 13.

THE plaintiff commenced this action before a justice of the peace to recover his costs as a justice of the peace in five general suits brought by the defendant against various parties, four of which suits judgment was rendered by default. The plaintiff claimed on account of all these suits, \$12.50. The defendant admitted his liability to the extent of \$8.50, but controverted the charge of one dollar in each of the default suits. There was a jury trial, resulting in a verdict for the plaintiff for \$12.50. The case was appealed to the Circuit Court, and submitted upon an agreed statement of facts, upon which the court found for the plaintiff in the sum of \$12.50. The defendant appeals.

J. B. W. Westfall, for appellant.

W. M. Shaw, pro se.

DAY, J.—The trial judge has certified the question which it is desirable to have the opinion of this court,

1. **JUSTICE OF THE PEACE: FEES.** “W. M. Shaw, a justice of the peace for Madison county, Iowa, plaintiff in the entitled case, has charged A. J. Kendig \$1.00 for trial

Shaw v. Kendig.

eral cases brought before said Shaw by said Kendig as plaintiff, which were merely default cases.

Query. "Is a justice entitled to a trial fee in default cases under Secs. 3541, 3542 and 3804 of the statute? Also in same case referred to plaintiff Shaw has charged defendant Kendig a fee for entering judgment by default, fifty cents, and also a trial fee in the default cases.

Query. "Is a justice of the peace entitled to charge in the same fee bill both for judgment by default and a fee for trial?"

I. *As to the first question submitted by the trial court.* The sections of the Code referred to are as follows: "3541. But if, where the plaintiff's claim is not founded on such written instrument, the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and shall render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice. 3542. In the case contemplated in the last two sections, if the defendant has previously filed a counter-claim, founded on a written instrument, purporting to have been signed by the plaintiff, calling for a certain sum, the justice shall allow such counter-claim in the same manner as though the defendant had appeared, and shall render judgment accordingly." So much of section 3804 as is material to the present is as follows: "Justices of the peace shall be entitled to charge and receive the following fees: * * * * *

For entering judgment by confession, after the suit brought, fifty cents. For entering judgment by confession, not on suit brought, one dollar. For entering judgment by default, or on a plea of guilty, fifty cents. * * * * *

For trial of all causes, civil or criminal, for each six hours or fraction thereof, one dollar."

"A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact." Code, § 2739.

Section 2738 of the Code provides: "An issue of fact arises:

1. Upon a material allegation of fact in the petition, denied

 Shaw v. Kendig.

by the answer. 2. Upon a material allegation of new matter presented in the answer and denied by the reply. 3. Upon an allegation of new matter in the reply, which shall be considered as controverted by the opposite party without further pleadings. Any other issue is one of law." It is evident from the provisions of the foregoing section that an issue of fact may arise by operation of law, without a pleading. It is further evident, from an examination of other provisions of the statute, that section 2738 does not contain all the issues of fact which may arise. Section 2665 of the Code provides: "There shall be no reply except: 1. When a counter-claim is alleged; or 2. When some matter is alleged in the answer which the plaintiff claims to have a defense, by the reason of the existence of some fact which avoids the matter alleged in the answer." Where, then, the plaintiff simply relies upon a denial of the new matter alleged in the answer, no reply is proper, and the new matter is deemed controverted. See section 2712, also *Davis v. Payne and Shadduck*, 45 Iowa, 1. Further, section 2712 of the Code provides: "But an allegation of value, or amount of damage, shall not be deemed to be controverted by a failure to controvert it." Recognizing the necessity of proof of an allegation of value, or amount of damage, even when there is no denial, section 3541 requires the justices in cases where the plaintiff's claim is not founded on a written instrument purporting to have been executed by the defendant, and the defendant does not appear, to proceed to hear the allegations and proofs of the plaintiff, and render judgment for the amount to which he shows himself entitled. In other words, notwithstanding the defendant's default, the justices are required to try the issue which the law raises as to the amount to which the plaintiff is entitled. For such trial, section 3804 of the Code, in our opinion, allows the justice a fee of one dollar.

II. *As to the second question submitted by the trial court.* Section 3804 of the Code provides that the justice shall have

Drady v. The D. M. & Ft. D. R. Co.

a distinct fee for entering a judgment by confession after suit brought, by confession not on suit brought when contested, and by default, or on a plea of guilty. The fee for entering judgment is altogether distinct from the fee for a trial, and when a trial is had the justice is entitled to both. Appellant insists that this would allow the justice more in a case where the defendant makes default than where he contests the case and causes a trial lasting six hours. This is evidently a mistake. The justice in a contested case is allowed a fee of fifty cents for entering judgment in addition to the fee for trial. In cases coming under sections 3541 and 3542 of the Code, a justice of the peace is entitled to both a trial fee and a fee for entering judgment.

AFFIRMED.

DRADY V. THE D. M. & FT. D. R. CO.

1. **Railroads: CONSTRUCTION OF SIDE TRACKS OVER STREETS.** Where a railroad duly authorized by an ordinance of a city, and also by virtue of section 1321, Revision, constructed its track along a certain street, it was held that the successor in interest of said company had no right, after section 464 of the Code took effect, to construct switches or side tracks on said street without making compensation to the abutting lot owners for injuries resulting therefrom.
2. ———: **CONSTITUTIONAL LAW.** Where a part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void, if the provisions are distinct and separable. Even if the defendant in this case could not be denied the right to construct the switch in question, yet it can be done only upon making compensation therefor.
3. ———: **COMPENSATION: TRESPASS.** The compensation provided by section 464, Code, as amended, cannot be limited to damages for change of grade, but it includes all legitimate damages, and where the occupation of the street was unlawful, a party, if injured thereby, may maintain an action for the trespass before the permanent damages are assessed.

Appeal from Polk Circuit Court.

TUESDAY, DECEMBER 13.

THE plaintiff claims of the defendant one thousand dollars

Drady v. The D. M. & Ft. D. R. Co.

damages, and as a ground for such claim, in substance alleges that during the year 1875 the defendant, without the consent and against the wishes of plaintiff, and without having instituted any condemnation proceedings, and without having assessed or paid the plaintiff the damage which he sustained, laid down and commenced to operate a branch line or switch commencing at a point near the southwest corner of plaintiff's lot, which is a corner lot, situated upon Vine and Fifth streets and extending eastward to the corner of plaintiff's lot, at the intersection of Vine and Fifth streets, and thence in a northeasterly direction along Vine and Fifth streets, over the lots across the street east of plaintiff's lot. The plaintiff alleges that he resides on said lot, and has been, by reason of the switch in question, deprived of access to his lot, and damaged by the stopping of freight trains on said switch, and by the smoke, dust, cinders, debris, and the smell arising from trains loaded with cattle and hogs. The answer is, in substance, as follows:

1. That on the 21st of October, 1865, the city of Des Moines, then owning the fee in its streets, and being duly authorized by law so to do, granted to the Des Moines Valley Railroad Company, for the operation of a line of railway from the city of Keokuk through and beyond the city of Des Moines, a right of way, by ordinance duly passed, to construct its railroad over and across Market street, with the right to lay down a double or single track, with side tracks, turn-outs and switches on the same, and to run such locomotives and trains across and over the same as might be necessary in the operation of said railroad, at such reasonable rates of speed as might from time to time be fixed by the city council; that by said ordinance terms were imposed upon the said company as to the time within which said road should be built, and providing for the acceptance of said ordinance by the railroad company, and providing that when accepted the provisions of said ordinance should become a binding contract between the city of Des Moines and the railroad company; that said com-

Drady v. The D. M. & Ft. D. R. Co.

pany accepted the provisions of this ordinance, and it became a contract between the said parties; that by virtue of certain foreclosure proceedings the defendant in this action succeeded to all the rights, privileges, franchises, and incidents belonging or appertaining to the Des Moines Valley Railroad Company, and that the city of Des Moines has duly recognized the defendant company as the successors of the Des Moines Valley Railroad Company.

That the track complained of is situated in Market street, and is laid pursuant to the right and privilege granted by the said ordinance, and that said track is only a switch, made necessary in the operation of said railroad on Market street, by virtue of the rights granted by said ordinance, and that the laying of said switch or side track was essential to the maintenance and operation of said line of railroad upon Market street, and that defendant is under obligation to operate and maintain its said line of railway upon the said street, by virtue of said ordinance; that the said side track or switch was properly located and constructed, and is operated under the provisions of said ordinance, and with due care and without negligence.

2. That in the year 1868 the Des Moines Valley Railroad Company, duly organized for the construction and operation of a line of railway from the city of Keokuk to the town of Fort Dodge, by virtue, and in the assumption and exercise of the authority there given, and the power then conferred by the statutes of Iowa, constructed its line of railway over and upon Market street in the city of Des Moines, adjoining plaintiff's property, and, by virtue thereof, acquired the right to maintain over said street, in connection with its main line of railway, such side tracks, switches and turn-outs, as became necessary thereafter in the use, maintenance and operation of its said line of railway; that by virtue of foreclosure proceedings the defendant has become invested with all the rights and privileges of the Des Moines Valley Railroad Company; that in

Drady v. The D. M. & Ft. D. R. Co.

the exercise of such privileges, and without negligence, it constructed and operated a switch in connection with its main line of railroad, said construction and operation being necessary to the maintenance and operation of its main line of railway, the switch so constructed being the one complained of in plaintiff's petition. Defendant denies that it has been guilty of any negligence in the construction, maintenance and operation of said switch.

3. Defendant denies that plaintiff is, in any way, damaged by the laying of said switch complained of, but avers that the city of Des Moines is, and was at the dates mentioned in the petition, the owner of said street in fee, having control over the same, and that by virtue of the authority duly given by said city, as well as by the laws of the State of Iowa, the main line of railway now owned by defendant was located on and constructed over said Market street during the year 1868; and that the laying of said switch, and the operation of the same, as a part of its line of railway, in no wise inflicts any additional injury upon plaintiff's property, and gives the plaintiff no right of action for damages, said switch having been properly constructed and operated, without negligence by defendant; and defendant further avers that the construction of said switch was a necessity to the operation of said main line of railway.

4. Defendant avers that no part of its switch is laid upon plaintiff's premises, nor is the grade in front of plaintiff's property changed by reason thereof; but the grade remains the same as it was before said switch was laid, and that said switch is properly constructed upon ground over which the defendant has, and had, the right of way at the time of the construction of the switch, and is operated and maintained in a prudent and careful manner, and without negligence on the part of the defendant. Wherefore, defendant says, plaintiff suffered no damage for which the law affords a right of action against defendant.

5. The fifth count is not involved in this appeal, and hence is not set out.

6. That prior to the 22d of March, 1858, the Keokuk, Ft. Des Moines & Minnesota Railroad Company was a body corporate, having for its object the construction and operation of a railway from the city of Keokuk, northwestward along the valley of the Des Moines river, through the then town of Ft. Des Moines, now city of Des Moines, and northward toward the Minnesota line, and had, at that date, constructed only a small portion of its contemplated line of railway, extending only a short distance up the Des Moines river. That on the 22d day of March, 1858, the legislature of the State of Iowa passed an act, which took effect April 7, 1858, by which there was granted to the said Keokuk, Ft. Des Moines & Minnesota Railroad Company, for the purpose of aiding in the construction of a railroad from the city of Keokuk, up and along the valley of the Des Moines river, by way of the town of Ft. Des Moines, to the northern line of the State, certain large bodies of land hitherto granted to the Territory of Iowa, to aid in the improvement of the Des Moines river. That by the terms of said act the said railway company were required to pay certain large outstanding liabilities of the Des Moines River Improvement Company, and also certain liabilities existing against the State of Iowa, and were required to complete their said road to and through the town of Ft. Des Moines within a limited time, a certain portion of said grant of lands being expressly reserved to aid in the construction of said road from the city of Des Moines northward, and another portion to be applied in the construction of said road to the said city. That for the purpose of accomplishing the object in view by the State of Iowa, which was to secure the early construction and completion of the said line of railway up the valley of the Des Moines river, giving to the city of Des Moines the full benefit of said line of railway, by requiring the construction of the said line of railway to and through the said city northward, it became

• Drady v. The D. M. & Ft. D. R. Co.

and was, necessary, and was the duty of the said railway company, under the legislation aforesaid, in view of the location of the said town of Ft. Des Moines, and the situation of the surrounding country, to run through the said city, and over some of the streets thereof. That before actually locating its line through the said city, in deference to the control legitimately exercised by said city of Des Moines over its streets, the said railroad company, subsequently known as the Des Moines Valley Railroad Company but being the same corporation, asked of the city council of said city that it designate the streets over which the said company should pass in the construction of its line of road to and through said city. That pursuant thereto, the ordinance referred to in the first count of defendant's answer herein was passed by the said city council, and became, by the acceptance of the terms thereof by the said Des Moines Valley Railroad Company, a contract between the said city of Des Moines and said railroad company. And defendant avers that by the proceedings, as set forth in count number one of this answer, it succeeded to all the rights and immunities of the Des Moines Valley Railroad Company and became bound by all the obligations resting upon said Keokuk, Ft. Des Moines & Minnesota Railroad Company, respecting the maintenance and operation of said line of railway, in so far as it succeeded to the ownership thereof, that is to say, from the city of Des Moines to the city of Ft. Dodge, and that this defendant is now the owner of and succeeded to the land grant made to the said Keokuk, Des Moines & Minnesota Railroad Company, and is bound by the requirements of said act of the legislature of the State of Iowa respecting the maintenance and operation of the said line of railway as to that portion of said line of which this defendant became the owner.

That in the maintenance and operation of said line of railway, and in the discharge of its obligations arising under and by virtue of said act of the legislature, and in the discharge

Drady v. The D. M. & Ft. D. R. Co.

of its obligations as a common carrier, imposed upon it by law so long as it shall maintain and operate a railway, it became and was necessary for this defendant to enlarge the facilities of said line by the laying of the switch complained of in plaintiff's petition; that in the laying of said switch this defendant conformed strictly to the grades of said city of Des Moines, and constructed said switch in a proper, careful, and prudent manner, and in the operation thereof has been guilty of no negligence or want of care, and that whatever damage plaintiff has suffered has been merely such as is necessarily incident to the maintenance and operation of a railway over said street.

7. Defendant avers that the only damages suffered by plaintiff, if any have been suffered by him, are such damages as are necessarily incident to the prudent construction, maintenance and operation of the railway track complained of, and the running of cars thereon, and that defendants have been guilty of no negligence in the construction, maintenance, or operation of said track, and that the grade of the street was not changed, and that the fee of said street is, and always has been, in said city of Des Moines.

Defendant further alleges, that whatever damages plaintiff may have sustained by reason of the matters and things set out in the petition yet he cannot recover of the defendant in this action he having failed to take any steps to have his damages assessed or appraised as provided by law, and the remedy, if any plaintiff has, is by having whatever damage he may have sustained assessed according to the statutes of the State relative to proceedings for condemnation for right of way.

The city ordinance referred to in the answer, and which is to be considered a part thereof, is as follows:

"SECTION 1. Be it ordained by the City Council of the City of Des Moines that the right of way be and the same is hereby, granted to the Des Moines Valley Railroad Company

Drady v. The D. M. & Ft. D. R. Co.

through the city of Des Moines, over and across Market street, and such other streets and alleys east and west of Market as may be necessary to run through the city, with the right to lay down a double or single track, with side-tracks, turn-outs, and switches on the same, and to run such locomotives and trains of cars over the same as may be necessary in the operation of said road, and at such reasonable rates of speed as may from time to time be fixed by the said city council of Des Moines; provided, however, that said right of way shall not be exclusive, and the city hereby reserves to itself the right to grant to any other railroad company the right to pass over and across said streets and alleys with its tracks; and provided said railroad company shall build their said road on the grade of the city, or on such grades as may be agreed upon; and provided further, that the right of way over Market street, on the west side of the Des Moines river, is upon the condition that said railroad shall be built through said city within five years from the first day of January, A. D. 1865.

"SEC. 2. Be it further ordained that the right to build and operate a railroad bridge on Market street, over and across the Des Moines river, in the city of Des Moines, is hereby granted to the Des Moines Valley Railroad Company; provided said railroad company shall build, or cause to be built, a railroad bridge across said river within five years from the first of January, 1865.

"SEC. 3. And it is hereby understood that the grants made in the first section are upon the condition and consideration that the said railroad shall be built and running into the city of Des Moines on the 31st day of December, A. D. 1866, and it being further understood that said city only grants such rights in so far as it has the power to grant the same.

"SEC. 4. Be it further ordained that this ordinance shall operate as a contract between the city of Des Moines and said Des Moines Valley Railroad Company, upon the grants herein made being accepted by the said railroad company, which ac-

ceptance shall be entered upon the records of the city council.

"October 21, 1865."

The plaintiff demurred to the various counts of the answer as follows:

"Plaintiff demurs to the first count, because the same does not state facts sufficient to constitute a defense in this:

"1. The city of Des Moines at the time of the adoption of the ordinance mentioned in said count did not possess any corporate capacity to pass the same, nor did the city acquire such right until after the Code of 1873 took effect and became operative.

"2. Said count does not state or show that the city has taken any action or granted defendants any rights or privileges since the original grant, or since the Code of 1873 became a law.

"3. The original grant of the city, as set forth in said first count of defendant's answer, would not and does not, authorize the defendant to occupy any portion of the street with its tracks, not occupied at the date of the taking effect of the Code of 1873, to-wit, the 1st day of September, 1873.

"4. The said count admits the laying down of the track as stated in plaintiff's petition, and that the same has been so done since the 1st of January, 1877, and the same fails to show that defendant has taken any steps required to be taken under the laws of the State of Iowa prior to the laying down of a railroad track upon the streets of a city, and has wholly failed to take the steps necessary to acquire a right of way for said track, in accordance with the provisions of section 464 of title 4, of the Code of Iowa, and chapter 4, title 10, of the Code of 1873.

"Plaintiff demurs to the second count of said answer for the same reasons herein before stated, and also for the further reasons as follows:

"The law under which defendant claims to have acted in

Drady v. The D. M. & Ft. D. R. Co.

laying down the said track was repealed by the adoption of the Code of 1873, and since that time section 464, above cited, has been the only law under, or by virtue of which, the defendant had authority to make additions to, or lay down new tracks within the limits of the city of Des Moines. There has been no law in force in the State of Iowa since the 1st of September, 1873, allowing or giving the defendant the right to lay down a new track upon the streets of the city of Des Moines, without first proceeding to obtain the right of way and paying the damage to abutting property as provided in the sections and chapters of the statute herein before cited.

"Plaintiff demurs to the third count of the defendant's answer for all of the reasons herein before assigned, and also for the further reason that the same simply pleads legal conclusions. The main fact that the switch mentioned may have been, and still is, a necessity, constitutes no ground for the destruction of plaintiff's property without just compensation therefor.

"Plaintiff demurs to the fourth count of the defendant's answer for all the reasons herein before stated. The mere fact that the grade of the street remains unchanged constitutes no defense to the plaintiff's cause of action, the suit being for the damage which plaintiff has sustained in being deprived of the street, etc.

"Plaintiff demurs to the sixth and seventh counts of the defendant's answer for each and all of the causes herein before set forth, and also for the further reason that the laws therein mentioned and referred to were repealed long prior to the date of the creation or organization of defendant, and the law in force at the date thereof, and under which defendant was organized, reserves the right to place any limitation the State may elect to impose upon the franchises which any corporation might obtain or employ.

"The seventh count presents no defense in this, that defendant is a mere trespasser, and having damaged plaintiff, any

Drady v. The D. M. & Ft. D. R. Co.

law which would deny to plaintiff a trial by jury according to the course of the common law would be unconstitutional and void."

The court sustained this demurrer. The defendant appeals.

Nourse & Kauffman, for the appellant.

Sickmon & Barclay, for the appellee.

DAY, J.—I. It must be conceded that under the provisions of section 1321 of the Revision and the ordinance in question the Des Moines Valley Railway Company acquired the right to lay its track upon Market street, and that under the decisions of this State the proprietor of abutting property could not recover damages if the track was constructed and operated in a proper manner. See *Milburn v. The City of Cedar Rapids*, 12 Iowa, 246; *Slaten v. Des Moines Valley Railroad Co.*, 29 Id., 152; *City of Davenport v. Stevenson*, 34 Id., 225; *City of Clinton v. Railroad Co.*, 37 Id., 61; *Ingram et al. v. C., D. & M. Railroad Co.*, 38 Id., 669; *Cadle v. Muscatine Western Railroad Co.*, 44 Id., 13; *Burr v. City of Oskaloosa*, 45 Id., 275; *Davis v. Chicago & N. W. Railway Co.*, 46 Id., 389; *The State v. Davenport & St. Paul Railway Co.*, 47 Id., 507. Before the switch in question was constructed, however, the following changes in the law had been made: Section 1321 of the Revision had been amended by chapter 47, acts of Fifteenth General Assembly, so as to read as follows: "Any such corporation may raise or lower any turnpike, plank-road, or other highway, for the purpose of having its railway cross over or under the same, and in such cases said corporation shall put such turnpike, plank-road or other way, as soon as may be, in as good repair and condition as before such alteration at such place of crossing." Section 464 of the Code, as amended by chapter 6 of the laws of the Fifteenth General Assembly, respecting the powers of cities, had also been enacted, as follows: "They

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Drady v. The D. M. & Ft. D. R. Co.

shall also have the power to authorize or forbid the location or laying down of tracks for railways and street railways on all streets, alleys, and public places, but no railway can thus be located and laid down until after the injury to property abutting upon the street, alley, or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided for taking private property for works of internal improvement in chapter 4 of title 10 of the Code of 1873." See Miller's Code, Sec. 464.

The principal question involved in this case is to what extent and in what manner is the defendant, which succeeded to the rights of the Des Moines Valley Railroad Company, affected by this change in the statute? It is insisted upon the part of the appellant that when the Des Moines Valley Railroad Company, under a legally conferred authority, constructed the line of its railway upon Market street, that it thereby acquired the right at any future time to construct upon that street such necessary side tracks and switches as its increasing business might demand, and that the exercise of this right cannot be restricted or controlled by any amendment of or change in the law. Appellant cites and relies upon *Cleveland & Pittsburgh Railroad Co. v. Speer*, 56 Penn. St., 326, as in its essential features like the case at bar. This case, however, is not in point upon this question as there had been no change in the general law intermediate the date of the construction of the main line and the switch complained of. The points determined were, that a charter authorizing the construction of a railroad necessarily confers the power to construct side-tracks and switches, and that for the construction of a railway over a street in a town, pursuant to provisions of the charter, the owner of an abutting lot cannot recover damages. Section 464 of the Code is in terms applicable to all railway tracks which may be constructed in the streets of a city after its passage. It applies to the defendant, we think, unless to allow it

such application would contravene some constitutional provision. In the enactment of section 1321 of the Revision, the State made no contract, either express or implied, that as to the Des Moines Valley Railroad Company or those succeeding to its rights, this section should remain for all time unrepealed or unamended. Citizens have no vested rights in the existing general laws of the State which can preclude their amendment or repeal, and there is no implied promise on the part of the State to protect its citizens against incidental injuries occasioned by changes in the law. Cooley's Constitutional Limitations, page 347.

There is no implied contract between a State and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of the franchise more burdensome or less lucrative, any more than there is between the State and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force. *Thorpe v. The Rutland & Burlington Railroad Co.*, 27 Vt., 140; *Rodemacher v. The Milwaukee & St. Paul Railroad Co.*, 41 Iowa, 297. It is conclusively presumed that the Des Moines Valley Railroad Co. constructed its line of railway upon Market street with knowledge that the State might repeal or modify the existing law as to the manner in which any more of that street might in the future be appropriated, and that it impliedly consented that the State might do so. Neither it, nor its grantee, can justly complain that this privilege has been exercised. The company may insist that its right to the property which it has acquired shall be recognized and respected. But it cannot lawfully demand that all the provisions of the statute in force when this property was acquired shall be continued for the purpose of rendering its use more convenient and profitable.

The ordinance relied upon by defendant does, it is true, purport to constitute a contract between the city of Des Moines and the Des Moines Valley Railroad Company. But the city

Drady v. The D. M. & Ft. D. R. Co.

of Des Moines is a mere creature of the statute and can exercise such powers only as are directly, or by necessary implication, conferred upon it. It is not competent for the city, by ordinance, to take away the general power of the State to revise or amend its statutes. In accepting the ordinance from the city the Des Moines Valley Railroad Co. is presumed to have known what limitations the law imposes upon the city's authority. There is no analogy between a right of way acquired in the street of a city under section 1321 of the Revision, and the right of way acquired in the country under proper condemnation proceedings. Where a right of way is acquired under the statute for the condemnation of private property, the railway company acquires a right to the exclusive use of the whole one hundred feet in width, and may cover it with tracks. But a right of way acquired under section 1321 of the Code must be enjoyed in connection with the public, and the railway company must put the street in as good repair as it was before any alteration which it may have made in grade. What we have said applies to the first three counts of the answer.

II. The sixth count of the answer alleges, in substance, that on the 22d day of March, 1858, the legislature of the State of Iowa passed an act granting to the Keokuk, Ft. Des Moines & Minnesota Railroad Company, subsequently known as the Des Moines Valley Railway Company, certain large bodies of land, and requiring said company to pay certain large outstanding liabilities of the Des Moines River Improvement Co., and certain other liabilities then existing against the State of Iowa, and to complete their road to and through the town of Ft. Des Moines, now city of Des Moines, within a limited time, and that in the maintenance and operation of said line of railway, and in the discharge of its obligations arising under said act of the legislature, and of its obligations as a common carrier imposed upon it by law, it became necessary to enlarge its facilities by the laying of the switch complained of.

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constitutional
law.

Section 464 of the Code confers upon cities power to authorize or forbid the location or laying down of tracks for railways on all streets, alleys, and public places. Now it may be that the State, having by special statute, and as a condition of the enjoyment of its bounty, required the construction of the railway in question *to and through* the city of Des Moines, cannot constitutionally authorize the city to forbid the company such use of the streets as may be necessary to the proper and successful management of its road.

It is apparent from an examination of section 464 of the Code that the legislature had two distinct objects in view, namely: *first*, to give to the cities complete control over their streets, and to empower them to forbid their occupation by lines of railway; *second*, to provide that the streets could be occupied by railway tracks only after compensation for the injury to abutting property. Now, if it should be conceded that the first object, as to the defendant, cannot be accomplished, this is no reason why the second object may not be attained. The law may, as to the defendant, be unconstitutional and inapplicable so far as the first object is concerned, and perfectly constitutional and applicable as to the second. In Cooley on Constitutional Limitations, fourth edition, page 215, it is said: "Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall." If it should even be conceded that, under the facts alleged in the sixth count, the defendant cannot be denied the right to construct the switch in

 Drady v. The D. M. & Ft. D. R. Co.

question, still we are clearly of opinion that it can be done only upon making compensation as provided in section 464.

III. The fourth count alleges that no part of the switch is laid upon plaintiff's premises, and that the grade in front of ^{compensation: trespass.} plaintiff's property has not been changed. Appellant insists that section 464 of the Code requires compensation to be made only for a change in the grade of the street. This argument is based mainly upon the fact that the section, as originally enacted, provided that the injury to abutting property should be ascertained and compensated in the manner provided for *compensation of injuries arising from re-grade of streets in section four hundred and seventy of this chapter*. It is said, and perhaps correctly, that section 469 is the one intended by the legislature.

By chapter 6, laws of Fifteenth General Assembly, section 464 of the Code, was amended by striking out the words above indicated in italics, and substituting in lieu thereof the following words: "Taking private property for works of internal improvements, in chapter 4, of title 10, of the Code of 1873." Whatever may have been the proper construction of the section before the amendment, we are clearly of the opinion that now the compensation to be made can not be limited to damages arising from a change of grade, but that it extends to all legitimate damages arising under chapter 4, title 10 of the Code.

IV. The seventh count of the answer alleges that plaintiff has failed to take any steps to have the damages assessed or appraised as provided by law, and that the remedy of plaintiff, if any he have, is to have his damages assessed according to the statutes relative to proceedings for condemnation of right of way. In *Daniels v. The Chicago & N. W. Railroad Co.*, 35 Iowa, 130, 135, it is said: "It has been quite uniformly held, and may now be regarded as the settled doctrine in this country, under statutes such as ours, that the statute furnishes the only mode of ascertaining the damages consequent upon

Drady v. The D. M. & Ft. D. R. Co.

the taking of private property for public use." See also authorities cited in this case on page 136. The case of *Donald v. The St. L., Kansas City & N. Railroad Co.*, 52 Iowa, 411, does not militate against this rule, as in that case the question of defendant's liability was submitted to the Circuit Court, by agreement, on an agreed statement of facts, but the question as to the exclusiveness of the statutory remedy was not relied upon nor presented. A distinction, however, may very properly be recognized between the damages which have been sustained at the time of the commencement of the suit, and the permanent damages which will arise from the continued occupation and use of the right of way. The former, we think, may be recovered by action, although the latter must be assessed as provided in the statute. In *Ford v. The Chicago & N. W. Railroad Co.*, 14 Wis., 609, 617, it is said: "It seems that the past damages, or those occasioned by the trespass, might have been assessed by the court (*William v. Railroad Co.*, 16 N. Y., 97); or the judge might perhaps have ordered a jury for that purpose; but the permanent damages, or those which would accrue to the plaintiff by the continued use of the land by the company, can only be ascertained in the manner prescribed by the statute." It is said this doctrine is not applicable, because the plaintiff does not own any part of the street, and no trespass was committed upon his property. But the occupation of the street without compensating the plaintiff for the damages sustained was an unlawful act, and for this unlawful act the plaintiff, if injured thereby, may recover. The matters set up in the seventh count were not pleaded as a partial, but as a complete, defense.

It follows that the demurrer, as to all the counts of the answer, was properly sustained.

AFFIRMED.

WELLS ET AL. V. WELLS ET AL.

1. **Homestead: INCUMBRANCE ON: DOWER.** An order of court which set apart out of the homestead enough in value to satisfy the mortgage debt thereon, and then assigned as the widow's distributive share one-third in value of all the real estate without regard to the incumbrance, or requiring her to contribute towards its payment, approved.

Appeal from Jefferson Circuit Court.

TUESDAY, DECEMBER 13.

THIS is a proceeding for the admeasurement of dower. From the decree entered in the case Win. B. Murry, an intervening creditor, appeals. The facts are stated in the opinion.

Slagle, Acheson & McCracken, for appellant.

Culberson & Jones, for appellee.

DAY, J.—I. John H. Wells died insolvent, seized of five distinct tracts of real estate. One of these was the homestead, containing twenty-six acres.

John Wells, during his lifetime, and his wife, Margaret P. Wells, executed upon twenty acres of this homestead a mortgage to secure a note for the sum of \$2,000, with interest at ten per cent, payable semi-annually. This note became due October 9, 1874, and was on that day extended for two years. On the 9th of April, 1877, there was a balance due on said note of \$1,609. On the 17th day of July, 1877, the said note was due and unpaid to the amount of \$1,643.55, and on that date Margaret P. Wells purchased the note and paid for the same the total amount due thereon, and took an assignment of the note and mortgage to herself. The court found that there is due Margaret P. Wells the sum of \$1,643.55 with ten per cent interest, payable semi-annually, from the 17th day of July, 1877.

The court ordered that the referees in setting off the widow's

Wells v. Wells.

share of one-third in value of all the real estate in question, value all said tracts separately, and fix a cash value thereon, and that they fix a value upon the portion of the homestead covered by the mortgage, and a separate value upon the portion of the homestead not covered by the mortgage, and that out of the value of the said homestead tract not covered by the mortgage they deduct the amount due Margaret P. Wells on said note and mortgage, and set off to said Margaret P. Wells such amount of the remaining value of the homestead tract as will be the one-third in value of all the realty described. The order further directs that if the portion of the homestead covered by the mortgage, after deducting the amount due on the mortgage, be not equal to the one-third in value of all the real estate, the remainder of the homestead be set apart, and if necessary, property not included in the homestead, so that the share set apart to the widow shall be equal to the one-third part of all the real estate of which her husband died seized and in addition thereto, to the amount due on the note and mortgage held by Margaret P. Wells against the homestead tract.

There has thus been set apart to the widow, incumbered by the mortgage, such an amount of the real estate of which her husband died seized as shall be sufficient to discharge the mortgage, and in addition thereto be equal to one-third in value of all the real estate of which her husband died seized, without regard to mortgages on the homestead.

The appellant correctly states the question involved in this appeal to be as follows: "Is the widow entitled to one-third

in value of all the real estate of which her husband died seized, without regard to incumbrances that may be on that portion of the land used as a homestead?" The appellant insists that the amount due on the mortgage should have been deducted from the value of all the real estate, and that one-third in value of the remainder should have been set apart to the widow as her dower.

1. HOMESTEAD: incumbrance on: dower.

Wells v. Wells.

In *Trowbridge v. Sypher*, 55 Iowa, 352, and in *McGlothlen v. Hite*, 55 Iowa, 392, it was held that the distributive share of the widow in property of which the husband died seized, not the homestead, was liable to contribute *pro rata* to a mortgage thereon, in which she had joined. Neither of these cases touches the question involved in this case. In *Wilson v. Hardesty*, 48 Iowa, 516, all of the property of which the husband died seized, including the homestead, was covered by a mortgage in which the wife had joined. It was held that the widow was entitled to have one-third part in value of all the land set off to her so as to embrace the homestead, without a liability to contribute to any part of the mortgage, unless it should be necessary to resort to her share after exhausting the other mortgaged property. The fact that in *Wilson v. Hardesty* the mortgage was upon all the property of which the husband died seized, whilst in the case at bar the mortgage was upon a part only of the homestead, does not distinguish the case in principle. The point really decided in *Wilson v. Hardesty*, is that the widow's distributive share may be set apart in the homestead without regard to a mortgage thereon, if there be enough of other mortgaged property to satisfy the mortgage debt. In the case at bar the court set apart out of the homestead enough in value to satisfy the mortgage debt, and then assigned the widow's distributive share out of the balance, without requiring her to contribute to the payment of the mortgage debt. The order of the court is within the principle of, and is justified by, *Wilson v. Hardesty*.

II. On the note and mortgage purchased by the plaintiff there was due April 9, 1877, when the semi-annual interest was payable, \$1,600.

The plaintiff bought the note July 17, 1877, paying therefor the amount due at that date, \$1,643.55.

The court found that the amount due plaintiff was \$1,643.55, with interest thereon at ten per cent from July 17, 1877. The

Hyler v. Wellington.

real amount due plaintiff is \$1,600, with interest from April 9, 1877, at ten per cent payable semi-annually. If the attention of the court below had been specially called to this slight error in computation, it is probable that it would have been corrected without the expense of an appeal. The decree will be modified as above indicated, but no costs will be taxed against appellee.

MODIFIED AND AFFIRMED.

HYLER v. WELLINGTON.

1. **Contract: PAROL TESTIMONY TO VARY: AMENDMENT.** A written contract for the transfer of an interest in a promissory note considered, and construed to constitute the transferee the absolute owner of the note, except so far as his ownership was qualified by the contract itself; and that an amendment to the petition, the object of which was to let in parol testimony to show a different intent, was properly rejected.

Appeal from Dubuque Circuit Court.

THURSDAY, DECEMBER 15.

ACTION for money alleged to have been collected by defendant for plaintiff. In September, 1876, the defendant received by indorsement from the plaintiff a promissory note of which she was the payee. The agreement under which the note was received by him was expressed in writing, which was as follows: "This certifies that Julia A. Hyler has placed in my hands for collection a note of Howard, Carroll & Ratcliff, for \$500 and 10 per cent interest from December 3, 1875; my interest in said note being \$400 and interest from this date at ten per cent per annum until paid; fifty dollars of the balance, if that amount or more is realized over and above my interest, to be paid to Mrs. Hyler when the note is sold, disposed of or collected.

WM. E. WELLINGTON."

The whole note was collected and the whole proceeds were retained by the defendant. She claims that he was entitled to

Hylar v. Wellington.

retain only \$400 and the interest thereon, and she brings this action to recover the balance. There was a trial by jury and a verdict and judgment were rendered for the plaintiff for \$50.60. The plaintiff appeals.

James H. Shields, for appellant.

Fouke & Lyon, for appellee.

ADAMS, CH. J.—During the progress of the trial the plaintiff asked leave to amend her petition, and leave was refused. She complains of the action of the court in this respect.

The amendment which the plaintiff asked leave to make averred in substance that the plaintiff purchased certain machinery of the defendant at the agreed price of \$400; that the note in question was transferred to the defendant for the purpose only of transferring to him, in payment for the machinery, an interest in the note to the extent of \$400 and interest to accrue thereon at 10 per cent; that the understanding, had verbally, was that the defendant was to account to her for all proceeds of the note in excess of the interest transferred in payment for the machinery; and that was the true intent of the written agreement executed to her by the defendant for the purpose of showing the terms upon which he received the note.

The court, in our opinion, did not err in disallowing the amendment. The object of the amendment was to let in parol evidence as to the meaning of the agreement. The plaintiff's position is that the agreement by its terms does not clearly show whether the defendant was bound to pay to the plaintiff more than fifty dollars from the proceeds or not, in case there was more than fifty dollars collected in excess of the \$400 and interest thereon, and her proposition of law is that where the parties to a written agreement have not clearly expressed their intent it is competent to show by parol what their intent was, provided only the parol evidence of their intent does not contra-

Hyler v. Wellington.

dict the written evidence. In support of this proposition she cites *Grimes v. Centenary College*, 42 Iowa, 591. But a careful examination of that case, we think, will show that it does not hold the doctrine contended for. In that case the defendant had agreed to pay the "mechanics and laborers" of one Reichard. The action was brought upon the agreement by a person who claimed to be one of the mechanics. It was said in the opinion that the alleged fact that he was one of them might be shown by parol. But the office of such evidence was merely to apply the language of the contract to the persons intended.

There was no occasion in the case at bar to apply the language of the contract by parol evidence to any specific thing or person, nor do we think that there was any such ambiguity as to let in parol evidence.

It is very clear that for some consideration, it matters not what, the defendant acquired an interest in the note to the extent of \$400, which amount, with interest which should accrue thereon, should be retained by the defendant from the proceeds; and that his right thereto should be paramount to any right of the plaintiff in the note. It is equally clear that \$50 was to be paid the plaintiff, if that amount should be collected in excess of the \$400 and interest, and that her right to be paid the \$50 was paramount to the right of the defendant to be paid for his services if he was to be paid. As to what was to be done with the balance the agreement does not expressly provide. But we cannot hold that it was to be paid to the plaintiff and give any reason for the specific provision whereby the defendant was to pay her \$50. The plaintiff contends that the meaning of that provision is that she was to have that amount whatever he might sell the note for, and that the balance was contingent. But we cannot so regard it because the payment to her of the \$50 was expressly made contingent upon its being realized.

By the transfer of the note to the defendant he became the

Barhydt & Co. v. Perry.

prima facie owner thereof, and he must be regarded as the owner except so far as his ownership was qualified by the written agreement which was given for that purpose. That provides for the payment to the plaintiff of the sum of \$50 upon a certain contingency. The contingency has happened, and that sum is due her. The balance we must assume that the defendant was to retain. We think that the plaintiff has recovered to the full amount of her contract and has no reason to complain.

AFFIRMED.

BARHYDT & CO. V. PERRY ET AL.

1. **Partnership: VOLUNTARY CONVEYANCE: CONSTRUCTIVE FRAUD.**
Where a member of a partnership, which was largely indebted, made a voluntary conveyance of all his individual property, but without any purpose to defraud the firm creditors, such conveyance would be constructively fraudulent, and liable to be avoided.
2. —: —: **SUBSEQUENT CREDITORS.** Where the conveyance was voluntary, and included all of the individual property of one member of a partnership, which was largely indebted at the time, subsequent creditors whose means have been used to pay off the prior indebtedness will be subrogated to the rights of the prior creditors, and they may avoid such conveyance.

Appeal from Page Circuit Court.

THURSDAY, DECEMBER 15.

THE plaintiffs, who hold an unsatisfied judgment against the defendant, A. W. Perry, for \$731.41, bring this action to set aside a conveyance of two hundred acres of land from A. W. Perry to his wife L. A. Perry, and to subject it to the satisfaction of said judgment. The plaintiffs allege that the conveyance was made without consideration, and with intent to defraud creditors, and is void.

The court dismissed the plaintiffs' petition. The plaintiffs appeal. The material facts are stated in the opinion.

McPherrin Bros., for appellants.

W. W. Morsman, for appellees.

DAY, J.—The evidence establishes the following facts: The defendant, A. W. Perry, had a stroke of paralysis in 1876, which weakened him somewhat, both mentally and physically. In March, 1878, A. W. Perry formed a copartnership with E. Stoney, who was then engaged in mercantile business in Clarinda. The stock then inventoried \$2,900, and the debts were about \$1,600. This partnership continued until the first of May, 1879. In the meantime the stock had increased about one-third, and the debts had also increased. On the first of May, 1879, the partnership was dissolved, Stoney buying Perry's interest, and agreeing to pay therefor \$500, and to assume all the debts of the firm. At the time of this sale no inventory was taken, but both parties supposed the assets were sufficient to pay the firm debts. During the existence of this copartnership, on account of the ill health of Perry, the active management of the business was intrusted to Stoney. Perry did not know how much the firm was indebted at the time of the dissolution. Stoney testifies that the indebtedness was about \$3,000, but Perry testifies that he has since discovered the indebtedness amounted to \$6,000 or \$7,000, and that he has paid indebtedness of the firm to that amount. Immediately upon the dissolution of the firm, A. W. Perry conveyed, without consideration, to his wife, the property in controversy, worth \$5,000, and a farm in Michigan valued at \$4,800, and also two mortgages, one for \$1,400, and one for \$700. These conveyances included all his property except a span of ponies and a wagon worth \$100. At the time of making these conveyances he was not individually indebted. The defendant, A. W. Perry, testifies that in making these conveyances he did

Barhydt & Co. v. Perry.

not intend to hinder, delay, or defraud any creditor of Stoney & Co., or of his own, but, that being in poor health, and in danger of another stroke of paralysis, his purpose was to confer all his property upon his wife whilst he was possessed of mental capacity to dispose of it, and that he intended the conveyance to be in lieu of a will. Soon after Perry retired from the firm reports detrimental to the financial standing of Stoney were received at the Commercial Agency, and the outstanding indebtedness was pressed for collection in a manner which threatened the destruction of the business. Perry was urged by Stoney and the plaintiffs' agent to come back into the business for the purpose of restoring confidence in the firm, and of saving what Stoney had agreed to pay him for his interest. Yielding to their solicitations the partnership was renewed on the 29th day of May, Perry surrendering the note which he had received for his interest. At this time the firm was indebted to the plaintiffs. At the time of the reformation of the partnership, A. W. Perry did not inform the agent of plaintiffs, nor Stoney, that he had made a conveyance of all his property, although the conveyances of the real estate were recorded. After the reformation of the partnership the plaintiffs, supposing A. W. Perry to still own the real estate in question, sold to the firm, and to A. W. Perry, goods for the store, for which debts were contracted, which, on the fourth day of March, 1880, were merged in the judgment which the plaintiffs now seek to satisfy out of the real estate in question. Perry and Stoney again dissolved partnership September 8, 1879, Perry continuing the business, and assuming the debts of the firm. Perry continued the business until November, 1879, when he sold out to Vance, invoicing the stock at \$2,900. Since the debts which form the basis of this suit were contracted, all the debts which existed when the conveyance in question was made have been discharged, partly from the proceeds of the store, and partly from a loan secured by a portion of the property conveyed to L. A. Perry.

Barhydt & Co. v. Perry.

I. The defendant, A. W. Perry, believed that the firm assets were sufficient to pay the firm liabilities. The firm debts were assumed by Stoney, and he was justified, we think, in believing that Stoney would discharge the firm liabilities. There was no purpose to defraud the firm creditors, and the conveyance was not actually fraudulent. Still, as A. W. Perry was liable to the firm creditors, and he conveyed away all his property without consideration, the conveyance, as to such creditors was constructively fraudulent, or fraudulent in law, and liable to be avoided. See Story's Equity, Sec. 355. In *Hook v. Moore*, 17 Iowa, 195, after a full citation of the authorities, the rule was announced that on the mere ground that a conveyance is voluntary, where the grantor has no fraudulent views, a subsequent creditor cannot impeach it. See, also, *Whitescarver v. Bonney*, 9 Iowa, 480; *Fifield v. Gaston*, 12 Iowa, 218; *Lyman v. Cessford*, 15 Iowa, 229; Story's Equity Jurisprudence, section 361, and cases cited.

II. Another principle, however, is involved in this case. A. W. Perry did not, before contracting the debts to the
 2. —:—: plaintiff, discharge the debts which existed at the
 subsequent time he made the voluntary conveyance. On the
 creditors. contrary, with the debt which he contracted to the plaintiffs he augmented his stock of goods, and acquired the means, in part, of paying off the existing creditors. The debts were, in effect, to the extent of the property which he received from plaintiffs, simply transferred from existing creditors to the plaintiffs. The debts were not really discharged, but a new creditor was substituted. Under such circumstances it has been held, and very properly, we think, that the subsequent creditors are entitled to the same rights as those of the creditors whose debts their means have been used to pay. In *Bump on Fraudulent Conveyances*, pages 315, 316, it is said: "The mere fact that the prior debts have been paid off will not alone render the transaction valid, though it is entitled to

Barhydt & Co. v. Perry.

great weight. A great deal will depend upon the mode in which such debts are paid. Paying off one debt by contracting another, is not getting out of debt. Proving, therefore, that the prior debts have been paid off is doing nothing, if in doing so the donor has contracted others to an equal amount, and is not sufficient. * * * In such instances the subsequent creditors are subrogated to the rights of the creditors whose debts their means have been used to pay. Any other rule would simply permit the debtor to take the property of subsequent creditors, and give it to the donee."

The following authorities fully support the foregoing doctrine: *Paulk v. Cook*, 39 Conn., 566; *McElwee v. Sutton*, 2 Bailey (S. C.), 123; *Savage v. Murphy*, 34 N. Y., 508; *Mills v. Morris*, 1 Hoffman, 419; *Richardson v. Smallwood*, Jacob's Reports, 557.

As the conveyance was voluntary, and included all of A. W. Perry's property, who was largely indebted at the time, and these debts have been paid off, in part, with the proceeds of property for which the debt to plaintiffs was contracted, and an old debt due to the plaintiffs was simply transformed into one subsequent to the conveyance, we are of opinion that the conveyance in question, as against the plaintiffs, is constructively fraudulent, and that it cannot be supported.

REVERSED.

MEYERS V. KIRT ET AL.

1. **Intoxicating Liquors: UNLAWFUL SALE: CHARGE UPON THE PREMISES: CONSENT OF OWNER.** In order to charge the premises with the lien of a judgment for damages resulting from the unlawful sale of intoxicating liquors thereon, it is necessary to show that the owner of the premises had knowledge of such unlawful use of the same, and also that he consented thereto.

Appeal from Buchanan Circuit Court.

THURSDAY, DECEMBER, 15.

ACTION for damages alleged to have been sustained by the plaintiff by reason of the sale of beer to her husband by the defendant Kirt. Reckermire was made defendant, as being the owner of the premises upon which the beer is alleged to have been sold. The defendants, for answer, denied all the allegations of the petition. There was a trial by jury and verdict and judgment were rendered against both defendants. The defendant Reckermire appeals.

Woodward & Cook, for appellant.

D. W. Bruckhart, for appellee.

ADAMS, CH. J.—A right of action accrues to the wife who sustains injury, in property or person, by reason of the sale to her husband of intoxicating liquors, which cause him to become intoxicated. Code, section 1557. Intoxicating liquors mean alcohol, and all spirituous and vinous liquors. Code, section 1555. To these must be added beer, when sold to a person intoxicated, or in the habit of becoming intoxicated. *Jewett v. Wanshura*, 43 Iowa, 574. The evidence in this case shows pretty clearly that the defendant Kirt sold to the plaintiff's husband beer, when he was in the habit of becoming intoxicated. The validity of the judgment against Kirt is not questioned.

But the court charged the premises where the beer was sold with the lien of the judgment. The defendant Reckermire,

Meyers v. Kirt.

who is the owner of the premises, complains of the action of the court in this respect. He moved to set aside the verdict as against him, and grant him a new trial on the ground of the insufficiency of the evidence to sustain the verdict as against him. The court refused so to do, and he assigns error on such refusal. The assignment is in the words: "The court erred in refusing to set aside the verdict, and in not granting him a new trial for the reason that there was no evidence to show that the defendant Reckermire had any knowledge of, or assented to, the unlawful act, if any, on account of which the judgment was rendered."

It was necessary for the plaintiff to show both knowledge, on the part of Reckermire, of the unlawful use of the premises, and consent by him thereto. Code, section 1538. The most that the evidence shows in this case is, that Reckermire was present at one time in Kirt's saloon, with others, when the plaintiff's husband purchased and drank in the saloon a glass of beer. It is not shown that Reckermire saw him do so, or that his attention was called to the fact afterward. But conceding that there was enough to prove knowledge on the part of Reckermire, it was not sufficient to prove his consent. The burden was upon the plaintiff to prove both. The mere fact that Reckermire had knowledge that the plaintiff's husband purchased and drank the glass of beer, if such was the fact, had no tendency to show that he consented to the sale. That should have been shown by something which he said or did, or by something which he omitted to say or do, which he might reasonably have been expected to say or do, if he did not consent. As there was no evidence upon this point, we think that the verdict, as to him, should have been set aside.

The appellant filed an amended assignment of errors. The appellee moved to strike the same from the files, on the ground that it was filed too late. We have disposed of the case upon an assigned error embraced in the original assignment. This renders it unnecessary to pass upon the motion.

REVERSED.

 Miller v. Dayton.

MILLER V. DAYTON.

57	436
79	671
57	433
87	221

1. **Instructions: ACTION BY ADMINISTRATOR: FAILURE OF DEFENDANT TO TESTIFY.** In an action by an administrator for damages for the malicious killing of deceased, where the evidence was wholly circumstantial and consisted of distinct facts and circumstances having nothing of the character of personal transactions between the defendant and the deceased, the defendant is not rendered incompetent to testify as to the existence and true character of such facts and circumstances by section 3629, Code; and an instruction that if the defendant had not satisfactorily explained the material circumstances and transactions appearing in evidence against him by other testimony, then the fact that he was not a witness in his own behalf may be considered in evidence against him, was proper.
2. ———: **FAILURE TO PRODUCE WITNESS: PRESUMPTION.** The law does not require a party to account for his failure to produce any witness, who mistakenly or corruptly might be willing to testify to facts explaining circumstances casting suspicion upon such party. Under the facts of this case an instruction that such failure might be considered by the jury as a circumstance against the defendant was erroneous.
3. ———: **EVIDENCE: CONSPIRACY.** The acts and declarations of a party alleged to be a co-conspirator, tending to establish the fact of a conspiracy, are admissible in evidence although no conspiracy was alleged; and it is for the jury to determine from the whole testimony whether a conspiracy has been shown, and if not, then such testimony should be disregarded.
4. **Evidence: IMMATERIAL.** Evidence tending to show the fabrication of testimony by the defendant in order to avoid a criminal prosecution, although not prejudicial, was immaterial and irrelevant, and not admissible.

Appeal from Jefferson District Court.

THURSDAY, DECEMBER 15.

THE plaintiff, as administratrix of the estate of W. L. Miller, deceased, brings this action to recover of the defendant damages for the alleged willfully and maliciously killing the said W. L. Miller. There was a jury trial resulting in a verdict and judgment for the plaintiff in the sum of \$5,050. The defendant appeals. The material facts are stated in the opinion.

 Miller v. Dayton.

McJunkin & Henderson, for the appellant.

E. W. Stone, and *Wilson & Kellogg*, for the appellee.

DAY, J.—The deceased was killed by a shot from a gun whilst walking along the highway with the plaintiff, his wife, on the evening of the 29th of August, 1877. The person who fired the fatal shot was concealed on the opposite side of the fence, on the north side of the road, behind a fallen tree top, covered with dried leaves, and affording complete protection from sight from the road. The surrounding trees and brush were so situated that in a very few steps the party could be completely out of sight from the fence. No one saw any person do the shooting. The evidence connecting the defendant with the offense is altogether circumstantial, some of the circumstances being testified to by the plaintiff herself. The defendant did not testify. The court instructed the jury as follows: "Under the law of this State, a defendant in a civil or criminal case may be a witness in his own behalf. Now the court instructs you that if you find there are material and important circumstances appearing in evidence against the defendant, and that you further find that defendant has not satisfactorily explained said circumstances by other evidence then the fact that he was not a witness in his own behalf may be considered in evidence against him, and you are to give it just such weight as it is entitled to when considered with the other evidence in the case."

The defendant insists that this instruction is erroneous, because the defendant was not a competent witness under the provisions of section 3639 of the Code. This section provides that no party to an action or proceeding shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, against the executor or adminis-

1. INSTRUCTIONS: action by administrator: failure of defendant to testify.

Miller v. Dayton.

trator of such deceased person. But this prohibition shall not extend to any transaction or communication as to which such executor or administrator shall be examined in his own behalf, or as to which the testimony of such deceased person shall be given in evidence. The evident purpose of this section is to close by the law the mouth of one party to a transaction or communication when the mouth of the other party thereto has been closed by death. If any transaction as contemplated in this section occurred between the defendant and the deceased, it was the shooting of the deceased. No one saw that transaction. No one gave direct testimony respecting it. It may be that under section 3639 of the Code, it would not be competent for the defendant to testify that he did not shoot the deceased. But the guilt of the defendant was sought to be shown, not by direct evidence that he shot deceased, but by proof of a number of direct facts and circumstances, occurring both before and after the homicide, having nothing of the character of a personal transaction between the defendant and the deceased. As to the existence and true character of these facts and circumstances the defendant is not rendered incompetent to testify by the provisions of section 3639 of the Code. It is evident that the court had reference to these facts and circumstances in the instruction under consideration. The court say: "If you find there are material and important circumstances appearing in evidence against defendant, and that the defendant has not satisfactorily explained said circumstances by other evidence, then the fact that he was not a witness in his own behalf may be considered in evidence against him." The instruction, as limited and qualified, is, we think, not erroneous.

II. The defendant was indicted and tried for the murder of the deceased. Upon the trial of the civil action the plaintiff

2. —: fall- introduced as a witness one Kelly, who testified
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 sumption. that the defendant told him that Martha Dayton,
 his sister-in-law, testified upon the criminal trial
 that she saw the defendant's gun in the pantry in his house, at

Miller v. Dayton.

the time she heard the report of the discharge which killed deceased. Respecting this the court instructed the jury as follows: "If you find from the evidence that the defendant had knowledge of the facts that said Martha Dayton would testify to—that at the time the gun was fired at the place of the homicide the defendant's gun was in his house and the defendant did not have it—and if the defendant has not introduced said witness, nor accounted for her absence, then you may consider such fact against the defendant, and you should give such circumstance just such weight as you think it entitled to when considered with the other evidence in the case." If the defendant knew that Martha Dayton *knew* where his gun was when the homicide was committed, and such knowledge was not equally in the possession of the plaintiff, then the jury might consider the fact that Martha Dayton was not introduced as a witness as a circumstance against the defendant, for the jury would have been authorized to infer that if the gun had been in the house, the defendant would have proved it, and that proof of the place in which the gun was would have been prejudicial to him. See the following authorities upon this point. *Turks v. Richardson*, 4 B. Monroe, 276; *State v. Cleaves*, 59 Me., 298; *Gordon v. The People*, 33 N. Y., 501 (508); *State v. Rosier*, 55 Iowa, 517.

There is an essential difference, however, between the defendant's knowing that Martha Dayton knew where the gun was at the time of the homicide, and his knowing that she would testify the gun was in his house at that time. The gun may not have been in the defendant's house, and still the defendant may have been innocent. Or the gun may have been in the defendant's house, and Martha Dayton may have had no knowledge respecting it. And yet, resting under a mistake, she may have been willing to testify to what she believed to be true, but which was false in fact, or, actuated by an undue zeal to shield her relative, she may have been willing to testify to what she knew to be false, or to what she did not know to be

 Miller v. Dayton.

true. Now, if the circumstances were such, there would be two potent reasons why this witness should not be introduced. *First.* It would be grossly dishonest knowingly to introduce a witness to testify to a known falsehood, or to a fact not known to be true, or to a matter respecting which it is known that the witness is mistaken. *Second.* It might greatly prejudice the defendant's case if the mistake or the dishonesty of the witness should be detected. Was it then incumbent upon the defendant, in order to prevent any adverse inferences from his failure to introduce Martha Dayton as a witness, to show that, notwithstanding the fact that Martha Dayton would swear that his gun was in the house, she was honestly mistaken as to the fact, or was willing willfully to testify to what she knew to be false, or did not know to be true? We are of opinion that the law casts no such burden upon the defendant. Such a rule would require a party to account for his failure to produce any witness, who, mistakenly or corruptly, might be willing to testify to facts explaining circumstances casting suspicion upon such party. We think the court erred in giving this instruction.

III. Certain acts and declarations of Jefferson Dayton after the homicide was committed, were shown to the jury. Respecting this testimony the court instructed the jury as follows: "It is claimed by the plaintiff that the defendant and his brother Jefferson Dayton were jointly engaged in the commission of said offense, and, after it was committed, that they were jointly engaged in preventing, or endeavoring to prevent, suspicion from attaching to the defendant, and to enable him to escape justice. The court has permitted certain acts and statements of the said Jefferson Dayton, to go to the jury upon the theory that he and the defendant were conspirators as charged. Now, if you should find that they were such conspirators, the acts and declarations of Jefferson Dayton, may be considered by you so far as they bear upon the question as to whether or not they were endeavoring

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dence: con-
spiracy.

Miller v. Dayton.

to divert suspicion from the defendant, and to prevent him being brought to justice, if you find that they did conspire for said purpose. But if you find no such conspiracy existed, then the acts or declarations of said Jefferson should not be considered against the defendant." In admitting this evidence, and in giving this instruction, it is claimed the court erred.

1. It is insisted that evidence of the acts and declarations of Jefferson Dayton was improperly admitted, because there was no proof of any conspiracy between the defendant and Jefferson Dayton. The law is that before the acts and declarations of an alleged conspirator in regard to the common design, as affecting his fellows, can be admitted, a foundation must be laid by proof sufficient in the opinion of the judge to establish *prima facie* the facts of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. 1 Greenleaf on Evidence, section 111; see, also, Wharton's Criminal Law, section 702. It is not, however, necessary that the evidence of conspiracy should be direct and positive. The proof of the combination, must, of necessity almost always be extracted from the circumstances connected with the transaction. Wharton's Criminal Law, section 2351, *The State v. Sterling*, 34 Iowa, 443. It is not practicable in this case to review all the evidence, and refer in detail to all the minute circumstances which tend to support the conclusion that a conspiracy was formed between the defendant and his brother Jefferson Dayton, as claimed by the plaintiff. In our opinion the evidence was at least proper to be laid before the jury, as tending to establish the fact of a conspiracy. If the evidence was of such a character it was sufficient to authorize the submission to the jury of the declarations of Jefferson Dayton.

2. It is insisted, further, that the declarations of Jefferson Dayton were improperly admitted, because there is no allegation in the petition that these parties entered into a conspiracy. The gravamen of this action is not the conspiracy, but the un-

Miller v. Dayton.

lawful killing of Miller. The conspiracy is introduced merely as a means of establishing the principal fact which forms the foundation of the action. Under such circumstances it is not necessary that a conspiracy should be alleged.

3. It is claimed that if any conspiracy was entered into it terminated with the killing of Miller, and that the evidence of any act or declaration of Jefferson Dayton subsequent to that time is inadmissible. If, as claimed, however, the conspiracy also had for its purpose to prevent suspicion from attaching to the defendant, and to enable him to escape justice, the objects of the conspiracy were not fully completed when Miller was killed. See *Commonwealth v. Scott*, 123 Mass., 222; *Scott v. The State*, 30 Ala., 503.

Whatever the defendant himself may have done in the fabrication of evidence to prevent suspicion from attaching to him, or to avoid a prosecution, was proper to be shown to the jury and considered by them. Greenleaf on Evidence, section 37. And if another person conspired with him to assist in the accomplishment of this purpose, his acts and declarations, in furtherance of the common design, are, we think, admissible.

4. It is insisted that the court erred in the instruction above set out, in leaving the jury to determine whether a conspiracy existed. It is claimed that that question must be determined by the court. It is true the court must determine, in the first instance, whether there is sufficient *prima facie* evidence of a conspiracy to justify the submission to the jury of the acts and declarations of an alleged conspirator as evidence against his fellows. But, ultimately, it is for the jury to determine whether, upon the whole testimony, any conspiracy has been shown; and if they find that no conspiracy has been established, it is then their duty not to consider the acts and declarations which have been admitted of a supposed conspirator.

IV. Evidence was introduced tending to show that the

Mullen v. Peck.

defendant, in order to avoid a criminal prosecution, fabricated evidence that he had been murdered. Evidence

4. EVIDENCE: immaterial was admitted of the declarations of his father when his hat, perforated with shot, was found, and of the conduct of his wife when the hat was shown to her. This evidence was probably not prejudicial to the defendant, but it was immaterial and irrelevant, and should not have been admitted.

For the error before considered the judgment is

REVERSED.

MULLEN V. PECK.

1. ACTION: DISMISSAL OF: WHEN ALLOWED. A cause is not finally submitted to the jury until they are directed to enter upon the consideration of the case, and where a party offered to dismiss his case before the jury were instructed, but after the court had indicated what the instruction would be, the offer should have been allowed and the cause dismissed.

Appeal from Buchanan Circuit Court.

THURSDAY, DECEMBER 15.

ACTION upon a written contract. Trial by jury, verdict, and judgment for defendant. The plaintiff appeals.

E. S. Gaylord and D. W. Bruckart, for appellant.

Lake & Hannon, for appellee.

SEEVERS, J.—After counsel for the defendant began his argument to the jury the court directed the jury to withdraw, and

1. ACTION: dismissal of: when allowed. upon its own motion heard counsel on both sides upon the question whether there was any matter to be submitted to the jury, and upon the conclusion thereof indicated the jury would be instructed to find for the defendant. Thereupon the jury were called back and the court proceeded to draw the instructions. Whereupon counsel for the

The State v. Allen.

plaintiff asked leave to file an amendment to the petition, and time to prepare the same was given. The amendment was prepared and presented, but leave to file the same was refused. Thereupon the plaintiff asked "leave to withdraw her case," to which the defendant objected, and the same was refused, and the court instructed the jury to find for the defendant.

The statute provides: "An action may be dismissed, and such dismissal shall be without prejudice to a future action." "By the plaintiff before the final submission of the case to the jury * * " Code, section 2844. In *Hani's v. Bram*, 46 Iowa, 118, it was held a cause was not finally submitted to the jury until they had been directed to enter upon the consideration of the case. In the present case the plaintiff offered to dismiss before the jury had been instructed. No matter if the court had indicated what the instructions would be, for it is possible the court might change its mind and the plaintiff had the right to take his chances in that respect. What the instructions would be could only be known after they were read to the jury.

REVERSED.

THE STATE V. ALLEN.

1. **Criminal Law: ACCOMPLICE: CORROBORATION OF.** It is not necessary in order to sustain a conviction that an accomplice should be corroborated in every material fact to which he testifies; and where the jury found there was sufficient corroboration of the evidence of the accomplice this court will not interfere, provided there were facts in evidence from which the jury might fairly have so found.
2. —: —: **CORROBORATING TESTIMONY: CREDIBILITY OF WITNESS.** It is for the jury to determine the credibility of the witnesses, where there is contradictory evidence as to the corroborating facts.

Appeal from Fremont District Court.

THURSDAY, DECEMBER 15.

THE defendant was tried and convicted of the murder of John Long. He was sentenced to the penitentiary for life,

57	431
80	92
57	431
87	678
57	431
97	404

The State v. Allen.

and now appeals to this court for a reversal of the judgment against him.

C. S. Keenan and Hepburn & Thummel, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. John Long and his wife, Elizabeth Long, resided on their farm in Fremont county. They were advanced in years; their children had grown up and left them for homes of their own. The record before us does not disclose the age of John Long. It appears that his wife is sixty-seven years old. Sometime in the summer or fall of 1878 the defendant took up his residence with Long and wife under an arrangement by which he was to cultivate the farm for the ensuing year. Afterwards a written lease was made and signed by the parties.

About four o'clock on the morning of January 15, 1879, Elizabeth Long went to the home of one Tarrence, who owned and lived on an adjoining farm, and called him and requested him to go to her house for the purpose (as we understand the record) of searching for her husband, who, she alleged, was missing. Tarrence at once went to the house of the Longs, and stopping at the stable called Mr. Long two or three times, and getting no answer he went to the house and called the defendant, who was in his room in the upper story. The defendant came down stairs, and he and Tarrence went to the stable, where they found the dead body of Long lying in a stall in which one of his horses was standing. A candle which had been lighted, and a candlestick were found near his body. Tarrence asked Allen to take one of the horses and alarm the neighbors. Allen declined to go upon the ground that he was lame. It appears that he claimed to be lame from the effect of a kick received the day before from the horse in the stall in which the dead body was found. Tarrence went out into the neighborhood and reported the finding of the body, and

The State v. Allen.

soon a large number of persons collected at Long's place. The body was carried to the house, and a large number of wounds were found thereon. The skull was crushed in; there were wounds upon the face; the breast-bone was crushed, and some ribs were broken. There were marks of blood on the stall near where the body was found and within a short distance from the head of the deceased which had the appearance of having spurted up from the body and then run down the wall. There was also blood under the body. The hands were tightly clasped, and held in their grip some of the litter and trash of the stable, and hot water had to be used to relax the fingers to remove it. The horse which stood in the stall where the body was found was of a nervous, restless, and vicious disposition, as appears from the evidence. He had recently been shod with sharp shoes.

A coroner's inquest was held on the same day, and the conclusion was arrived at that the deceased came to his death by being trampled by the horse, and the theory of the defense now is that the old man heard some disturbance among his horses in the night and arose, dressed himself, and went out to the stable and was kicked and trampled to death by the horse. In a few days another inquest was held and there began to be a suspicion that Long had been murdered by his wife and the defendant Allen. They were arrested and imprisoned in the jail of the county. Both stoutly denied their guilt. The wife was sworn as a witness and testified at both inquests that she and Allen were innocent of the crime charged. She repeatedly stated to others during her imprisonment in jail that she was innocent and that Allen was innocent. She was brought before the grand jury in October, 1879, and there stated that the defendant, Allen, told her that he had made way with the deceased, and that was all she knew about the manner of his death. Upon the trial her testimony, in substance, was as follows: "That about a week before the death of

The State v. Allen.

the old man, Allen proposed to her that he should be put out of the way." Again on the night before his death the defendant said "he was going to put the old man out of the way"; that before defendant went to bed he came in from the porch, and "had a hammer in his frock," and after a time he went upstairs to bed; that in the night he came down stairs and into the bed-room where witness and her husband were sleeping, and that thereupon she ran out of doors and behind the smokehouse; that she heard defendant pound deceased on the head; that the handle of the hammer broke, and he then got a shovel with which he struck him; that defendant called her from behind the smokehouse, and that she went into the house, and they wrapped a quilt around his head to soak up the blood; that they then put his clothing on, and that after he was dead the defendant "took him and kind of dragged him out through the porch, and down to the south door of the stable, and laid him down inside of that door," and that witness went around to the east door and opened it so that defendant could see, and that then defendant put the dead body under the horse with a fork, and then "smashed" the fork, and told witness that she should say that "the old man heard a noise at the barn, and got up and went down, and that the horse had killed him;" that they burned the quilt used to wrap up his head, and washed the blood-stain from the carpet. In addition to the statement that the defendant dragged the body she stated that he "took him on his back," and laid him down inside the stable.

It will be observed that Mrs. Long virtually acknowledges that she was an accomplice in the commission of the crime of which she testifies. It is urged with great earnestness by counsel for the appellant that a new trial should have been granted because her evidence is not corroborated as required by section 4559 of the Code, and as we regard this question the all-important one in the case, we have read and re-read the record, and given to it

1. CRIMINAL
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plice: corrob-
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The State v. Allen.

that careful consideration which the importance of the case and the consequences attending the judgment demand.

It must be admitted that the witness does not appear in as favorable a light as she would have done if she had at once, upon being called upon for a statement of facts, given the evidence which she finally gave upon the trial. But the testimony of accomplices requires corroboration because, upon their own confession, they are partners in the crime. She confesses that she was so wicked and depraved that she joined in the willful, deliberate and premeditated murder of her husband. Her repeated denials of her guilt, and of the guilt of defendant, and that, too, under oath, were all submitted to the jury with the other facts in the case, and if the jury found that there was sufficient corroboration of the evidence, it is not for us to interfere, provided there were facts in evidence from which the jury may fairly have found that she was sufficiently corroborated. It will also be remembered that it is not necessary that an accomplice should be corroborated in every material fact to which he testifies. "If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be ground for their believing that he also speaks the truth in other parts as to which there may be no confirmation." *State v. Schlagel*, 19 Iowa, 169.

We will proceed to an examination of other facts which were put in evidence, and which the State claimed "tended to connect the defendant with the commission of the offense."

It appears that there was a slight fall of snow on the night of Long's death, and before, it is claimed, the crime was committed. Mrs. Long testifies that she stood and waited behind the smokehouse while the defendant killed her husband. Henry Long, a son of deceased, and also a son of Mrs. Long, testified that on the day after the alleged murder "he looked around the smokehouse, and there were tracks of a woman. I could see where she had stood." Another witness testified

The State v. Allen.

that she "saw a stain on the wall of the bed-room on the north side, down near the base; it is right to the left of the door as you enter the bed-room from the sitting-room. It looked like blood; we examined it; I should think it as large as a half dollar; it is on the right of the door as you enter the bed-room from the sitting-room." It does not appear from either the abstract of the appellant or that of appellee when the witness stated that she discovered the blood-stain, of which she testified. Catharine Hall, another witness, testified as follows: "When I arrived at four o'clock of the afternoon of the death, noticed that there seemed to be something on the snow like there was something dragged down the path toward the little gate; it looked as though there had been clothing dragged down there; it was all the way from the house to the little gate; several rods—not quite one-third the way to the stable." She also testified that on Sunday after the funeral she "noticed a good many marks of blood on the snow east of the gate toward the stable, on the path from the house to the stable."

Sometime after the death of Long a letter was found in a public road in the neighborhood, in which the writer intimated that he and the one to whom the letter was addressed murdered Long, and urging the one to whom it was written to "put it on them two boys and the old woman." This letter was not enclosed in an envelope and commenced with the words "Dear sir." It was signed by no one, but requested an answer to be directed to J. J. Flem, Denver City.

We need not set out this letter at length. It was claimed by the State that it was in the handwriting of the defendant, and was introduced in evidence for the purpose of showing that the defendant attempted to direct public attention from himself to other parties.

In addition to these facts Daniel Tarrence testified that when he called defendant down from his bed on the morning of the alleged murder, the defendant inquired where Mrs.

The State v. Allen.

Long was, and the witness answered: She says "you sent her after me." And he replied, "Well, I have been asleep since."

There are other facts of minor importance, which, although they may not tend directly to connect the defendant with the commission of the crime, yet were entitled to consideration by the jury. Among them, it appears a very close intimacy existed between the defendant and Elizabeth Long. They were in the habit of holding private and protracted conversations with each other in a confidential sort of way to such an extent as to be noticeable to visitors at the house. Another circumstance was, that on the day of Long's death some of the witnesses testified that at times the defendant was lame, and at other times there was no limp in his walk.

Taking all these facts into consideration, and still this man may be innocent. But that was a question for the jury to determine. That the jury were fully warranted in finding that there was sufficient corroboration of the accomplice, we have no manner of doubt.

This is upon the theory that the corroborating evidence above set forth was true. It is to be admitted that no other witnesses testified to marks of blood, and the dragging of something upon the snow; to tracks back of the smokehouse, and to what appeared to be a blood-stain in the bedroom, and indeed there is evidence directly contradictory to most of these facts. But here again we cannot invade the province of the jury. It was for them to determine the credibility of the witnesses and give credence to such as they believed to be speaking the truth.

It is urged that Elizabeth Long is not entitled to belief because she testified that deceased was dead when he was put into the stall with the vicious horse. It must be conceded that this was not true. The spurting of blood upon the wall of the stable and the claspings of the straw and trash in the hands would indicate that he died after he was laid upon the floor of the stable, either from the kicking of the horse, or by the

The State v. Allen.

hands of the defendant. But it does not follow that the evidence of the witness should be rejected for this misstatement. It may have been that although she supposed him to be dead he was only stunned into insensibility by the blows inflicted by the defendant, and that he actually died after he was put into the stable. If he was assaulted by the defendant and wounded so as to render him insensible, and placed in the stable, and afterwards died, even though he may have been kicked and trampled to death by the horse, the defendant would be guilty of murder the same as though deceased had died in the house from the wounds there received.

There was much testimony in the case by physicians and others, as to the nature of the wounds. Some testified that certain of the wounds could not have been inflicted by the horse, and others testifying that they all could be accounted for in that way. If the jury believed the former, it was a circumstance tending to corroborate Mrs Long, to the extent, at least, of showing that the deceased came to his death by violence at the hands of some one.

II. No exceptions were taken to the instructions given by the court to the jury. It is claimed, however, that the court erred in certain rulings in the admission and exclusion of evidence. We will now proceed to consider these objections.

It is claimed that the court permitted the witness Tarrence to detail a conversation he heard between the deceased and his wife, on the subject of a contemplated separation, and from which it appeared that the wife thought of leaving him. It is true that such a conversation was testified to by the witness. But it appears from appellee's abstract that counsel for defendant immediately objected and that the objection was sustained. The court remarked: "If this witness was present in any transaction between the prisoner and the deceased, that would be competent; but you cannot prove it by any declaration of deceased to witness." It thus appears that the objec-

The State v. Allen.

tionable testimony was ruled out and taken from the consideration of the jury.

III. It is urged that the letter above alluded to, and also an account book which was found in the prisoner's trunk, were permitted to go to the jury as evidence without satisfactory proof that they were in his handwriting. Here again it appears, from the appellee's abstract, that the lease of the farm, signed by the defendant, was used on the trial by witnesses who claimed to be experts in the comparison of handwriting, and after such evidence all these papers were submitted to the jury. There was no error in this. The witnesses who testified to the handwriting by comparison, are shown, as appears from appellee's abstract, to be qualified as witnesses. It is proper to observe, that appellee's abstract correcting that of appellant is in no manner controverted, and must be accepted as correct.

IV. Frances Ayres, a witness for the State, was interrogated in her examination in chief as follows:

"Did you notice Finis Allen at the funeral; if you did, what was his conduct there? Ans. I thought he was rather bold. I was there only a short time.

"What was the condition of Mrs. Long at the funeral that day? Ans. Oh! I don't know; I thought she didn't take it very hard."

It is urged that this evidence was incompetent, because it is a mere opinion and conclusion of the witness without the statement of facts as to defendant's conduct.

It is sufficient to say of this point that the record does not show that any objection whatever was made to the testimony of the witness.

V. E. C. Wilcox, the coroner, before whom both inquests were held, was called as a witness by the defendant, and was asked what Mrs. Long testified to at the second inquest. The question was objected to, and the objection was sustained. This ruling is claimed to be erroneous, because the evidence

 Turner & Company v. Woodbury County.

sought to be elicited was proper for the purpose of impeaching Elizabeth Long.

But we fail to find that any foundation was laid for such impeachment by the cross-examination of Mrs. Long. It is true that the counsel for defendant in her cross-examination asked her if she did not testify, at the second inquest, that the old man went down to the stable, and that he was gone so long that she became alarmed. She answered, admitting that she did so testify, and stated that the defendant told her to do so. Indeed, the whole record shows that Mrs. Long persistently denied all knowledge of the crime until she appeared before the grand jury. This conduct on her part could not be made more striking and apparent if Wilcox had been permitted to repeat what she admitted as to her testimony at the second inquest.

We have examined this record through and through and given the argument of counsel for defendant the most careful consideration, having noticed in this opinion all of the points made, and reach the conclusion that the judgment of the District Court must be

AFFIRMED.

TURNER & CO. v. WOODBURY COUNTY.

1. **County: ELECTION EXPENSES: LIABILITY FOR.** The necessary expense incurred by the township trustees in providing and furnishing a place in which to hold the general state election is not a just claim against the county.

Appeal from Woodbury District Court.

THURSDAY, DECEMBER 15.

THE petition alleged, in substance, that during the week preceding the general election of 1880, the trustees of Sioux City township, in Woodbury county, made application to the

57	440
81	507
57	440
89	167
57	440
113	247
57	440
121	294

Turner & Company v. Woodbury County.

county auditor, and also to a member of the board of supervisors of said county, for permission to hold said general election for said township in the court-house of said county situated in said township, which request said officers refused; that thereupon said trustees designated the office of plaintiffs, in said township as the place where said election should be held, and said election was held therein, occupying it for said purpose, and for counting the votes, two days and one night; that the plaintiffs, at the request of the trustees, furnished a large amount of fuel and lights; that the sum of \$15.00 is a reasonable compensation to plaintiffs; that plaintiffs presented their bill to the board of supervisors and they rejected it. The plaintiffs pray judgment for \$15.00. The defendant demurred to the petition. The demurrer was sustained, and judgment was rendered against the plaintiffs for costs.

The plaintiffs appeal. The court certifies the question involved, for our determination, to be as follows: "are the necessary expenses incurred by the township trustees in providing and furnishing a place in which to hold the general election of the State just claims against the county?"

Fawcett & Pardoe, for the appellant.

S. M. Marsh, District Attorney, and *Geo. W. Wakefield*, for the appellee.

DAY, J.—It is not claimed that there is any provision of the statute authorizing or requiring the county to pay the necessary expenses incurred by the township trustees in providing and furnishing a place in which to hold a general election. The statute provides that the board of supervisors shall provide for each election precinct, for the purpose of elections, one box, with lock and key, and the auditor shall prepare poll-books. Code, sections 614 and 615. The compensation of the township trustees and township clerk, when acting as judges of election, is provided

1. COUNTY:
election ex-
penses: lia-
bility for.

Woodman v. Dutton.

in sections 3808 and 3809, of the Code. Section 391 of the Code provides that the trustees shall designate the place where elections will be held. No provision is made for the payment by the county, for the place thus designated. Whether the omission was an intentional or a casual one, we cannot determine. The provision that the county shall pay certain of the expenses of the election would seem to negative the idea that the liability of the county shall extend further. It is true section 303 of the Code authorizes the board of supervisors to settle and allow all just claims against the county, but in *Foster v. The County of Clinton*, 51 Iowa, 541, it is said that a claim is not a just claim against a county, unless the law somewhere either requires or authorizes its payment. There is no provision of law under which the defendant can be held liable in this case. As bearing somewhat upon this question see *Halstead v. Mayor of New York City*, 3 Com., 403; *Hodges v. The City of Buffalo*, 2 Denio, 110.

AFFIRMED.

WOODMAN V. DUTTON.

1. **Practice: FINDING OF THE COURT: SUFFICIENCY OF EVIDENCE.** The finding of the court stands as the verdict of a jury and cannot be disturbed unless so clearly opposed to the evidence as to indicate that it was the result of passion or prejudice.

Appeal from Polk Circuit Court.

THURSDAY, DECEMBER 15.

THE plaintiff claims of the defendant the sum of \$2,363.23 on account of alleged deposits, made by himself, and by one Stolp, his assignor, with the defendant as a private banker. The defendant alleges that he paid all of the money deposited, to the plaintiff, and to his assignor, Stolp, and fully settled the same. The cause was tried to the court, and judg-

Woodman v. Dutton.

ment was rendered for the defendant. The plaintiff appeals. This case was before us on a former appeal, and is reported in 49 Iowa, 398.

Barcroft, Gatch & McCaughan, for the appellant.

Phillips, Goode & Phillips, for the appellee.

DAY, J.—The only point relied upon is that the finding of the court is not sustained by the evidence. The case is one of a clear conflict of testimony. The finding of the court stands as a verdict of a jury, and cannot be disturbed unless so clearly opposed to the evidence as to indicate that it was the result of passion or prejudice rather than of a deliberate and honest weighing of the evidence introduced.

Upon the former appeal, on evidence less satisfactory for the defendant than that now submitted, some of the members of this court were of opinion that the preponderance was in favor of defendant, and would have been better satisfied with the result, if the judgment had been in his favor. We are now united in the opinion that the finding of the court is not wanting in support from the evidence, and that the case is not one which warrants us in disturbing the judgment.

AFFIRMED.

HOEHL V. THE CITY OF MUSCATINE.

1. **Contributory Negligence: INSTRUCTIONS: ORDINARY CARE.** In an action against a city to recover for an injury to a building, alleged to have been caused by the wrongful and negligent obstruction of the natural channel, and diversion of the course of a stream by the defendant, the failure of plaintiff to use ordinary diligence and effort to prevent damage, and to incur moderate expense, if thereby the injury might have been prevented, would constitute contributory negligence, and entirely bar recovery; and an instruction that in such case he would still be entitled to recover such sum as would have prevented the injury if it had been expended, was erroneous.
2. — : — : **DIVERSION OF STREAM.** An instruction that if the plaintiff erected his house where the creek had flowed for ten years, and where, but for the house, it would still have flowed, and the damage was caused thereby, he would still be entitled to recover unless it had so flowed with his knowledge and consent, was erroneous. In such case he had no right to divert the flow of the creek, whether such flow had been with his knowledge and consent or not.
3. — : — : **RIPARIAN PROPRIETORSHIP.** Where a stream meanders through a city, and lots and streets have been platted without reference to it, nor bounded by it, the doctrine of riparian proprietorship is not applicable; and an instruction applying that doctrine to this case was error.
4. — : — : **GOOD FAITH.** Under the circumstances of this case, an instruction that the adoption in good faith by the defendant, of the plans of skillful and competent engineers and workmen, in constructing and repairing bridges and culverts across the creek in question, would not protect the defendant, was erroneous. Where the city acts in good faith and an unexpected damage results, the city is not liable.
5. — : — : **STATUTE OF LIMITATIONS.** Where the evidence showed that if any cause of action existed it must have arisen within five years before the commencement of the suit, an instruction excluding the question of the statute of limitations from the jury was proper.

Appeal from Muscatine Circuit Court.

THURSDAY, DECEMBER 15.

THE plaintiff claims of the defendant \$2,000, for alleged injury to his building, situated on the westerly one-third of lot 1, in block 32, in the city of Muscatine. The plaintiff states in his petition that a certain water-course known as

Hoehl v. The City of Muscatine.

Pappoose Creek has for twenty years last past flowed in and along the line of Sycamore street, in the city of Muscatine, which street adjoins the westerly line of his lot; that after the erection of his building, and on or before the 14th day of August, 1878, the defendant wrongfully, negligently and carelessly diverted the flow of said stream from its natural channel in which it was accustomed to flow at the time of the erection of plaintiff's building, and had flowed for a long time prior thereto; and wrongfully, negligently and carelessly obstructed the flow of water in said stream, by the driving of piles and the building of embankments in the bed and channel directly opposite the premises of plaintiff, and the placing and maintaining of other obstructions therein, and wrongfully, negligently and carelessly changed the current and direction and force of said stream, by the making of excavations, the driving of long rows of piling, the building of bulk-heads and other obstructions, and the building and changing of bridges and sewers in and along the channel of said stream, at points near and above the plaintiff's premises, whereby, on the 14th day of August, 1878, the water in said creek, being swollen and increased by recent rains, was thrown with great force and violence upon and against the rear and side of plaintiff's building, and into the same, and the walls of the rear part of said building, and the floors, ceilings, partitions and roof thereof were thereby broken down, injured and destroyed, and the entire building was cracked, weakened and defaced, and the goods of the plaintiff were wet and destroyed, the building was rendered untenable, and the business of plaintiff was interrupted for the space of seven weeks, to his damage \$2,000, and without negligence of the plaintiff causing or directly contributing to said injury and damage.

The defendant answered, denying the wrongful diversion of the waters of Pappoose Creek, and that it obstructed the stream as alleged, and that plaintiff sustained damage, and that he was without fault or negligence. The defendant al-

Hoehl v. The City of Muscatine.

leged that the plaintiff's injury was the direct result of his own negligence; that he contributed thereto by erecting his building in the bed of Pappoose Creek, thus obstructing the channel and causing the water to wash against his house, which was insufficient in material and construction to stand the extraordinary flood which caused the injury; that said building was erected more than twelve feet below the established grade of the city, and partly on Sycamore street, in the bed of the stream, and that the creek, before the plaintiff erected his house, had a wide and sufficient bed in which the water had flowed for more than ten years before said house was built, and where said water would naturally flow at this time were it not that said house deviated and has forced the water into a narrow and insufficient channel, which contributed to the injury for which the plaintiff sues; that plaintiff could have protected himself at moderate expense; that plaintiff's cause of action accrued more than five years before he instituted his suit and is barred by the statute of limitations; that the defendant had a right to have said creek flow over the ground where plaintiff's house was built, because from time immemorial and for more than ten years before said house was built said creek occupied said ground as its natural bed and channel, and would still flow over said ground but for the said house which obstructed the channel, and the driving of piles, making embankments, and other things referred to by plaintiff as done by defendant, were made to prevent a diversion of the channel against Sycamore street, which was threatened, because of said house; that defendant employed skillful engineers and competent workmen to plan and execute such protection; that said creek is a wet weather creek, with its bed ordinarily dry; that it crosses the entire plat of the city, running in various directions, irregularly, through the property and lots of individuals, and crossing all the streets of said city from the westerly part thereof to the Mississippi River; that water which is collected in said creek from ordinary rains

Hoehl v. The City of Muscatine.

is entirely harmless, but in times of extraordinary rains, floods, and freshets, the bed of the stream has not sufficient capacity to carry off the waters, and the stream becomes swollen and the waters rise many feet above the banks of said stream, and run into and upon and overflow all the low ground along its course, and particularly into and upon the premises of plaintiff, and did so run at and long before the time when plaintiff erected his house; that defendant owns and has charge of the streets of the city, and it is authorized, and it is its duty, to establish the grades of the streets of the city; to work the same, and keep them in fit condition for use; that the streets along and across which the said creek runs, cannot be used without making embankments and bridges, and such embankments and bridges when made require the driving of piles and other precautionary measures to protect them from being carried away by the periodical floods which, occur in said creek from the surface water which collects therein from extraordinary rains and the melting of snow; that the piles, embankments, bridges and other things complained of by plaintiff as causing his injury, were driven, erected, and built by defendant in the performance of its duty to grade and protect its streets, and were planned and done in a proper and skillful manner, and under the charge and direction of proper persons; that the damage complained of by plaintiff was caused by extraordinary rains and floods. The surface water so created could not be carried off by said creek, but overflowed its banks and the premises of plaintiff; that plaintiff's damage was occasioned by the wild waters of said stream, against which the defendant had a right to protect its streets, and against which the plaintiff was bound to protect himself.

The plaintiff replied, denying every allegation of the defendant's answer.

There was a jury trial, resulting in a verdict and judgment for plaintiff for \$250. The defendant appeals.

J. S. Richman and Brannan & Jayne, for appellant.

J. Carskaddan and Cloud & Cloud, for appellee.

DAY, J.—The evidence shows that the stream is of the character alleged in the answer, and that on the night of August 14th, 1878, an unusual rise in the stream tore down the north end, which was the rear of plaintiff's building, and about twenty-five feet of the west side. The plaintiff's building was erected on the east side of the stream, was nineteen feet wide from east to west, and fifty feet long from north to south, the west end extending seven inches upon the east side of Syracuse street. The evidence shows that before the erection of plaintiff's building, the entire lot upon which it was erected was frequently covered with water. The plaintiff's house was erected in 1869. Upon the part of the plaintiff, evidence was introduced tending to show that when he erected his building, it was five feet from the channel of the creek at the northwest corner; that the second year after the plaintiff's building was erected, he placed a row of piling on a line with the east side of Second street bridge, extending along the west side of his building and beyond the north end, and boarded them up on the side next the stream with two inch plank; that soon thereafter the city put in a row of piling on the west side of the creek, opposite the plaintiff's piling, and filled behind the piling with earth, thus narrowing the channel of the creek some twenty-five feet; that this piling was washed out in 1876 and the city then put in a double row of piling, which, with reference to the former piling, widened the channel of the creek about nine feet at the rear end, and about five feet at the Second street bridge; that this piling was taken out in 1878, at the time the plaintiff's building was injured; that in 1875, a bridge across the stream in question at Third street, three hundred feet north of the plaintiff's premises, was moved several feet to the east, and one Smalley put in rattlings on the east side of a lot which he owned on the west side of the creek

Hochl v. The City of Muscatine.

below the Third street bridge, the combined effect of which was to throw the channel of the stream further east, and upon the plaintiff's premises. Upon the other hand, evidence was introduced, upon the part of the defendant, tending to prove that the rear end of the plaintiff's building was placed immediately in the channel of the stream, narrowing the bed of the stream twenty feet, throwing the water to the west, and rendering necessary the piling driven by the city on the west side of the stream, for the protection of the west portion of Sycamore street, and the property on the west side of the stream; that when the bridge was moved east in 1875, it was placed diagonally with the stream, and that the bulk-head had a tendency to throw the water to the west, away from the plaintiff's premises; that no considerable change has taken place in the channel of the stream since the erection of the plaintiff's building, but that whatever change has occurred, has been in a tendency of the channel to the west side of Sycamore street, away from the plaintiff's premises. Evidence was also introduced, bearing upon the several instructions discussed in the opinion.

I. The 5th paragraph of the charge of the court to the jury is as follows: "If you find from the greater weight of evidence that the plaintiff erected his building wholly or partially in the bed of said creek, and thereby obstructed its natural channel and caused the waters thereof to wash against said building; or that the said building was insufficient in material or construction to stand such extraordinary floods as might reasonably have been anticipated; or that it was placed far below the established grade and partly upon Sycamore street and in the bed of the stream and thereby diverted its waters from their natural channel; or that the plaintiff could at a moderate expense and with reasonable effort have protected his said building and property from the alleged injury and damage, and neglected to do so, then you will inquire whether these acts of the

1. CONTRIB-
UTORY negli-
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Hohel v. The City of Muscatine.

plaintiff, or either of them, contributed directly to his alleged injury and damage; and if you find that such acts, or either of them, did so contribute to such injury and damage, then the plaintiff will not be entitled to recover, except as hereinafter stated in the 12th paragraph of this charge."

The twelfth paragraph of the court's charge, to which reference is thus made, is as follows: "If you find the plaintiff entitled to recover, the measure of his damage will be such sum as will repair the injury to his property, and compensate him for the immediate, necessary and actual loss sustained by being deprived of the use of his building, and injury to, or destruction of, his goods and chattels therein, caused by the wrongful, unlawful, or negligent acts of the defendant. It will be your duty to ascertain the condition of the plaintiff's building just before the storm or flood complained of, and then ascertain the injury and damage caused by said flood, and such injury and damage will be the measure of the plaintiff's recovery so far as his building is concerned; and this sum, added to the injury and damage to personal property, and by being deprived of the use of said building, if any, as above stated, will be the amount of your verdict.

But if you find that the plaintiff, at a moderate expense and by the exercise of ordinary care and effort, could have protected his property from the alleged injury and damage, then he can recover only such sum as would have thus protected him from such injury and damage. Such expense must be moderate, and the care and effort required, such as persons of ordinary prudence and caution would exercise under similar circumstances. Looking at all the facts and circumstances, as shown by the evidence, and the situation of the plaintiff's premises, it is for you to say, whether or not by such expenditure, and care, and effort, the plaintiff could have prevented the injury and damage for which he seeks to recover. If he could, his recovery will be limited to the sum which would have prevented said injury and damage; if he could not, he

will be entitled to all the damages he has sustained under the rule first above stated."

Taking these two instructions together the meaning of the court is not clearly apparent. It is very clear from the fifth paragraph of the court's charge, that the court in substance directed the jury, that, notwithstanding they should find from the evidence that the plaintiff erected his building wholly or partially in the bed of the creek, thereby obstructing the natural channel and causing the waters to wash against said building, and the building was insufficient in material and construction to stand such extraordinary floods as might reasonably have been anticipated, and was placed far below the established grade, and partly upon Sycamore street, and in the bed of the stream, thereby diverting its waters from their natural channel, and that the plaintiff could at a moderate expense and with reasonable effort have protected his property, and neglected to do so, and that these acts contributed directly to the plaintiff's injury, still he should not be absolutely denied the right of recovery, but might recover in some qualified and limited sense as prescribed in the twelfth paragraph of the charge. This instruction is clearly erroneous. For if the facts, or any of them, enumerated in this paragraph of the charge, existed, and contributed directly to the plaintiff's injury, then the injury was contributed to by the plaintiff's own negligence, and under no circumstances and to no extent, can he recover. In *Simpson v. The City of Keokuk*, 34 Iowa, 568, it is said: "If the plaintiffs, by the use of ordinary diligence and efforts, and at a moderate expense, might have prevented the damage, it seems necessarily to follow, that their negligence contributed to the injury, and this, upon a well settled rule, would defeat the plaintiff's recovery."

Coming now to a consideration of the 12th paragraph of the court's charge, it is difficult to ascertain with certainty what limitation the court designed to place upon the 5th paragraph, and under what circumstances and to what extent the court

Hohel v. The City of Muscatine.

intended to charge that the plaintiff might recover notwithstanding the negligent acts ennumerated in the 5th paragraph. That the court intended to place some limitation upon the 5th paragraph, is apparent from the two paragraphs taken together, and that any limitation is erroneous, we have already shown. The meaning of the court seems to be that if the plaintiff, at a moderate expense, and by the exercise of ordinary care and effort, could have protected his property from the alleged injury, and damage, and failed to incur such expense, and to exercise such ordinary care and effort, still he may recover such sum as would have prevented the injury, if it had been expended. But, we have already shown that the failure to use ordinary diligence and effort to prevent damage, and to incur a moderate expense, when such would have been sufficient to prevent injury, constitute contributory negligence, and entirely bar recovery. See *Simpson v. The City of Keokuk*, *supra*. If we have misapprehended the real meaning of the court, the fact that we have not been able to understand the court's meaning, renders it apparent that the jury may have been misled to the defendants prejudice. In giving the instructions under consideration the court erred.

II. The court instructed the jury as follows: "6. If you find that the injury and damage complained of were caused by 2. — : — : the floating down, in said creek, of wood, timber, ^{diversion of stream.} lumber or other material which washed against his house, independently of any wrong or negligence on the part of the defendant; or that such injury and damage were caused by the acts, lawful or unlawful, of other parties, or of the plaintiff; or that such injury and damage were caused by a storm of so extraordinary a character as that the force and effect thereof could not have been reasonably anticipated and provided against by the defendant; or that for more than ten years before said house was built, said creek, with plaintiff's knowledge and consent, flowed over the ground on which it was erected, and would have continued to flow over said ground

Hoehl v. The City of Muscatine.

but for the erection of said building, and that the plaintiff's injury and damage were caused thereby; then the plaintiff will not be entitled to recover." The defendant objects to the latter part of this instruction, which by necessary implication recognizes the doctrine that if the plaintiff erected his house where the creek had flowed for ten years prior thereto, and where it would, but for the erection of the house, have continued to flow, and the plaintiff's damage was caused thereby, still the plaintiff would be entitled to recover, unless the creek had flowed for ten years over the ground on which he erected his house, with his knowledge and consent. This portion of the instruction is, we think, erroneous. If the creek had flowed ten years over the ground on which the plaintiff erected his house, and would still have flowed there but for the erection of plaintiff's house, then the plaintiff had no right to divert the flow of the creek, whether he knew of and consented to such flow or not, and if the erection of the building in such place, and the diversion of the channel of the creek, caused plaintiff's damage, he cannot recover.

III. The court instructed the jury as follows:

"3. The owners of real property through or along which a
a — : — : riparian proprietorship. water-course flows are called riparian proprietors; and as such proprietors they have the right to the flow of the waters of the stream in their natural and accustomed channel; and no one of said proprietors has the right to divert said stream from its natural course, or obstruct the flow thereof to the material injury and damage of the others. The defendant, as the owner of the streets and alleys of the city for the use and benefit of the public, is a riparian proprietor whenever said stream passes through or along said streets and alleys, and is entitled to the rights, and subject to the liabilities of riparian proprietors. And it is a general principle that any person who without authority diverts the water of a stream from its natural course is responsible to any one who is entitled to have the water flow in its natural channel." In several

Hoehl v. The City of Muscatine.

other instructions the court applied to this case the doctrines of riparian proprietorship. In *Bardwell v. Ames*, 22 Pick., 334, Shaw, C. J., thus defines a riparian proprietor: "By this designation I understand an owner of land bounded generally upon a stream of water, and as such having a qualified property in the soil to the thread of the stream, with the privileges annexed thereto by law."

The evidence shows that the stream in question meanders through the city of Muscatine. Its general course is south, but in places it runs almost directly west. It is not made the general boundary of property situated upon its sides, but the town plat is laid out without any reference to it. In some places lots extend far into the stream, in others they are situated almost wholly within it, and in other places the bed of the stream occupies almost the entire width of a street. It is evident that no lot owner bordering upon the edge of the stream could have a qualified property in the soil to the thread of the stream, for his lot would always be bounded by another lot or by the edge of the street. It seems that the doctrine of riparian proprietorship cannot be applicable to the property thus situated. But, however this may be, it is evident from the entire case that the plaintiff does not base his right to recover upon the ground that he is a riparian proprietor. The plaintiff does not sue for the diversion of the water-course from his premises, nor for the deprivation of any interest in the stream. The ground of the plaintiff's action is that by the wrongful act of the defendant, the water was thrown upon his premises to his damage. His right to maintain an action for such injury does not depend upon his being a riparian proprietor, and the plaintiff does not base his claim upon such ground, either in his petition or in the evidence. In applying to the case, under its circumstances, the doctrines of riparian proprietorship, the court erred.

IV. The court instructed the jury as follows:

"7. The defendant had the right to grade, protect and im-

Roehl v. The City of Muscatine.

prove its streets and alleys, and to construct and repair the
 4. —; —: necessary bridges and culverts across the stream
 good faith. in question; and if in the execution of said work
 it adopted in good faith the plans of skillful and competent
 workmen, it would not be liable for injuries caused by any defects in said plans so far as it had authority to carry them out. But such plans would not protect the defendant in the material diversion and obstruction of the water-course in question; this could only be done in pursuance of legislative authority, and upon making due compensation to riparian proprietors injured thereby. And if you find that in the construction or repairs of such works the defendant wrongfully, unlawfully or negligently diverted or obstructed said creek, or the waters thereof, to the injury and damage of the plaintiff, he will be entitled to recover, unless prevented by other defenses of the defendant stated in the answer." The giving of this instruction is assigned as error. The particular portion of the instruction objected to is that part which directs the jury that the adoption in good faith of the plans of skillful and competent engineers and workmen would not protect the defendant in the material diversion and obstruction of the water-course in question. In this construction the doctrine of riparian proprietorship figures, and seems to have colored the view of the law entertained by the court. The only diversion or obstruction, of which the plaintiff complained, is the causing of the water to flow against the rear of his building. In another instruction the court in substance directed the jury that the care and diligence required of the defendant is that degree of care and diligence which would be exercised by persons of ordinary caution and prudence under similar circumstances. Appellee in argument concedes that the point in issue was, and is, was the appellant, in its attempted building of the bridges and improving of the creek, guilty of wrongful acts and negligence. Now, if the defendant in good faith, adopted the plans of skillful and competent engineers and workmen, it did all in that

Hoehl v. The City of Muscatine.

regard that human judgment and foresight could accomplish, and was not guilty of any wrongful or negligent act. But without some wrongful or negligent act the defendant is not liable. Upon this point the case of *Van Pelt v. The City of Davenport*, 42 Iowa, 308, is directly in point. Of course the city could not have adopted a plan, knowing that it would have the effect of flooding the plaintiff's premises, and for the purpose of producing such result. In such case the city would not act in good faith. But, when, as suggested in the instruction, the city acts in good faith, and an unforeseen and unexpected damage results, notwithstanding the exercise of reasonable caution, prudence and skill, there exists no ground upon which a recovery can be based.

V. The defendant assigns as error the giving of the following instruction:

"It appearing that the action of the plaintiff was commenced within five years from the time of the alleged injury and damage —: —: age, it will not be necessary for you to consider ^{statute of} limitations. the plea or defense of the statute of limitations, interposed by the defendant."

The evidence shows that the piling in the creek, which was there when the injury to the plaintiff's property occurred, was placed there in 1876; that the Third street bridge was removed to the eastward, and its position changed in 1875, and that the "attlings were placed in the creek the same year. The injury to plaintiff's property occurred in 1878, and this action was commenced in May, 1879. Whether the statute of limitations began to run at the time the obstructions complained of were placed in the creek, or at the time the injury occurred, the action was not barred when it was commenced. The court did not err, to the prejudice of the appellant, in giving this instruction. It is urged that the verdict is not supported by the evidence, and that it is contrary to the instructions given. In view of what has already been said, these objections need not be considered.

REVERSED.

FULLEAM v. THE CITY OF MUSCATINE.

1. **DAMAGES: DIVERSION OF WATER-COURSE: LIABILITY OF CITY.** The pleadings, the proofs and the instructions in this case, are substantially the same as in *Hoehl v. The City of Muscatine*, ante, p. 444. Following the decision in that case, the judgment of the court below must be reversed.

Appeal from Muscatine Circuit Court.

THURSDAY, DECEMBER 15.

ACTION to recover damages resulting from injuries to a house owned by plaintiff, caused by the obstruction of a water-course by defendant, whereby the stream was diverted from its natural channel and caused to flow against plaintiff's property. There was a verdict and judgment for plaintiff. Defendant appeals.

J. S. Richman, Brannan & Jayne, for appellant.

J. Carskadden and Cloud & Cloud, for appellee.

BECK, J.—I. The petition alleges that plaintiff is the owner of a brick house fronting on Second street, City of Muscatine, and that defendant, after the erection of plaintiff's building, unlawfully and negligently diverted and obstructed Pappoose Creek, which runs through the city near the house of plaintiff, so that the water was made to flow against it, breaking down the walls and otherwise injuring it. It is alleged that the injury occurred on August 14th, 1878.

1. **DAMAGES:**
diversion of
water course:
liability of
city.

The answer of the defendant denies the allegations of the petition. It also alleges that plaintiff contributed to the injury by the negligent construction of the house which was erected in or so near the bed of the creek that the foundation obstructed the natural channel and flow of the stream, causing the water to wash against the part of the building alleged to have been injured; that it was insufficient in material and construc-

Fulleam v. City of Muscatine.

tion and was below the grade of the streets established by the city, and that plaintiff could have protected it from the water by a moderate outlay, but neglected to do so. It is further alleged that Pappoose Creek flows through the city and upon its borders many buildings are erected and embankments constructed, and that at the time the injury complained of by plaintiff occurred, large quantities of timber, lumber and wood drifted from property adjacent to the stream, which "choked up" the creek, thereby causing the injury to plaintiff's property. The defendant further alleges that the work done by it along the creek was necessary to protect the public interest, and that in the planning and execution thereof the city employed skillful engineers and workmen, and that the work was executed in a skillful manner. The statute of limitations is also interposed as a defense, the answer alleging that the diversion of the stream complained of was done more than five years before this suit was commenced, and that the work along the creek alleged by plaintiff to be the cause of the diversion of the water was done more than ten years ago, before the injury occurred which is complained of by plaintiff, and more than ten years before the suit was brought.

II. It will be observed that the pleadings in the case present substantially the same issues that arose in the case of *Hoehl v. The City of Muscatine*, decided at the present term of this court. The evidence shows that the injuries sustained by plaintiff were caused by the same flood in the same creek which injured the property of plaintiff in the case just named. Indeed the cases present about the same state of facts relating to the respective injuries complained of and the liability of the defendant therefor, and the right of plaintiffs to recover in these actions against the city. The Circuit Court in this action gave instructions to the jury substantially the same as the instructions discussed in the opinion in the other case and designated as numbers 1, 2, 3, and 7, and also gave instructions recognizing the doctrines applicable to riparian owners which

Clews v. Traer.

correspond with other instructions referred to in that opinion. The same questions arising upon the instructions were decided in the case. Following our decision in that case the judgment of the court below must be reversed.

It will of course be understood that other points of our opinion in the former case, so far as they are applicable to this case, are approved and followed.

REVERSED.

CLEWS V. TRAER ET AL.

1. **Trustees: FRAUDULENT PURCHASE OF TRUST PROPERTY.** The testimony in this case, in respect to the purchase of corporate stocks, considered, and held sufficient to establish that the property in question was purchased by means of the fraudulent concealments and misrepresentations of one of the defendants, who held the property as trustee for plaintiff; that his wife, the other defendant, had knowledge of and participated in said fraudulent acts; and both were liable for the value of the property, less the amount paid.
2. **Trial: STIPULATION FOR BEFORE JUDGE: AMENDMENT.** Where the parties by a written stipulation provided for a trial before the judge, the acts, doings, rulings and decisions of the judge to stand in all respects as the action of the court, the judge thereunder had the same power to allow amendments as though the trial had been in open court.
3. **Fraud: TRUSTEE: ACTION FOR VALUE OF PROPERTY.** Where the sale of property was induced by false representations as to its value, the sale is void, and the purchaser will be regarded as holding the same in trust for the owner. In such case the assignee of the owner may maintain an action to recover for the fraud, and the defendants cannot complain that the consideration paid was not returned before suit was brought.
4. **Statute of Limitations: DILIGENCE.** Where an action is brought to recover on the ground of fraud, the statute of limitations does not commence to run until the discovery of the fraud, and a party is not required to plead and show diligent efforts to fasten the fraud upon a person, where he was ignorant that such person had any connection with the business, in order to arrest the bar of the statute.
5. **Amendment: NEW CAUSE OF ACTION.** Held, that the cause of action in this case was based upon the fraudulent conversion of the money to which plaintiff was entitled, and that the amendment did not set up a new cause of action.

Clews v. Traer.

Appeal from Linn Circuit Court.

THURSDAY, DECEMBER 15.

ACTION in chancery. There was a decree granting relief to plaintiff from which defendants appeal. The facts of the case so far as they are involved in the questions decided by the court appear in the opinion.

Hubbard, Clark & Dawley, for appellants.

Clark & Lynch and *R. A. Gilmore*, for appellee.

BECK, J.—I. The papers upon which this case is submitted for decision are voluminous. The abstracts contain more than four hundred pages, and the arguments of counsel are presented in more than two hundred and twenty pages. The pleadings are prolix, and the evidence presented for our consideration is minute in disclosing facts and circumstances and, in some instances, repetitions. To bring our opinion within reasonable bounds and to consider in our discussion only the questions of law and facts upon which the decision of the case turns, have involved watchfulness and no little labor. We shall not attempt to discuss with particularity the testimony. It would require many pages to review it even briefly. We shall, as we are accustomed in such cases, content ourselves with stating our conclusions as to the controlling facts put in issue by the pleadings.

II. The original petition was filed January 17th, 1878, and alleges that plaintiff was a stockholder owning fifty shares of stock of the par value of \$1.000 each in the Cedar Rapids and Northwestern Construction Company, which was engaged in building the Burlington, Cedar Rapids & Minnesota Railroad; that plaintiff was adjudged a bankrupt February 19, 1874, and J. Nelson Tappan was appointed the trustee in bankruptcy of his estate, and that on the 23d day of February, 1875, the Construction Company went into voluntary dissolution and the

Clews v. Traer.

defendant, John W. Traer, and others were made trustees to take possession of the assets, convert them into money and pay the same to the stockholders, after all debts of the corporation were paid. It is shown that the value of the assets of the company amounted to a large sum and that prior to the dissolution dividends were made and declared upon plaintiff's stock amounting to \$15,000, all of which were fraudulently concealed from plaintiff and from the trustee of his estate in bankruptcy, by the officers and managers of the construction company, and by defendant Traer, who had been from the first connected with the corporation and well knew all of its affairs. It is charged that he conspired with other officers of the company and with certain other parties, to cheat and defraud the plaintiff and his estate in bankruptcy, by falsely representing to plaintiff and to Tappan, that the stock of the company in the name of Clews was of little value, not exceeding \$600, and that it would be to the best interest of the estate to sell it for that sum. In pursuance of this conspiracy it is alleged that Traer, through certain agents and attorneys, induced Tappan as trustee in bankruptcy to transfer to Traer's attorney or agent, the stock standing in Clews' name for the consideration of \$1,200. The facts and evidence supporting the allegations of the conspiracy and fraud of defendant Traer, and his associates, are particularly and, in some instances, minutely set out in the petition, and it is alleged that they received \$15,000 upon the stock which they had purchased for \$1,200, Through their fraud and conspiracy. By the original petition John T. Ely, William Green and D. W. C. Rowley, who were officers of the construction company, and the two first named appointed trustees upon the dissolution of the corporation, were made defendants. It is shown that Tappan, the trustee in bankruptcy, transferred and assigned to plaintiff all claims held by him on account of the stock in the construction company.

In October, 1879, Alla D. Traer, wife of defendant, John W. Traer, was made a defendant by an amended petition which

 Clews v. Traer.

alleges that the stock was transferred to her by the agents or attorneys of her husband, who acted for him in carrying out his conspiracy to defraud the plaintiff; that the transfer and purchase of the stock was made under the directions of Traer, and the money (\$1,200), paid for the stock belonged to him and that his wife was but an instrument used by him to accomplish his fraudulent purposes.

On the 9th of February, 1880, plaintiff filed an amendment to his petition, whereby Alla D. Traer was made a defendant, which repeats many of the allegations of his prior pleadings, and states the facts and circumstances upon which his charge of fraud is based with some variations from the former allegations. Among other things he shows that Tappan, by the assignment of the stock, transferred all claim to and interest in the dividends in the hands of Traer, held by him as trustee of the bankrupt estate. Other allegations of the petition and amendments thereto need not be here referred to.

The defendants in their answer put in issue all averments of fraud found in the petition and amended petition. Defendants, Traer and wife, deny all misrepresentations and fraud with which they are charged in the petition, and in substance allege that the stock and dividends were acquired fairly and in good faith. The petitions as to all the defendants except Mr. and Mrs. Traer were dismissed. We think this decision of the court is correct, as we fail to find evidence upon which they can be held liable to plaintiff, upon the allegations of the petition. Indeed we do not understand that plaintiff's counsel in their arguments complain of the dismissal of the petitions as to the defendants, other than Traer and wife. A judgment for the sum of \$15,000, was rendered against Mr. and Mrs. Traer.

II. We are all united in the conclusion which is quite satisfactory to each of us that the testimony amply supports the judgment. To our minds the following facts are clearly established by the evidence:

1. TRUSTEES:
fraudulent
purchase of
trust prop-
erty.

Clews v. Traer.

1. Defendant Traer was a stockholder, officer and trustee of the construction company, and had been from the first actively engaged in the management of its affairs.

2. As trustee he was solely entrusted with the custody of the assets, books and papers of the corporation.

3. He had full and complete knowledge of all matters pertaining to the assets and business of the company.

4. He knew that plaintiff, or his bankrupt estate, was entitled to dividends amounting to at least \$10,500, received by defendant upon entering upon the discharge of his duties as trustee.

5. The assets of the company, much of them being in money, he held as a trustee, for the stockholders, being so constituted by the act of dissolution of the corporation.

6. He misrepresented the value of these assets to Clews and Tappan and induced them to believe that the sum to which they were entitled did not greatly exceed \$1,200 in value, the amount of the consideration of the assignment of the stock by Tappan.

7. He employed attorneys and agents to negotiate for the purchase of the stock who concealed from Tappan that the purchase was made for Traer or his wife.

8. The purchase made by these agents was for Traer, and neither of them at any time was a good faith purchaser.

9. Traer in all of the transactions connected with the purchase of the stock acted as the agent of his wife.

10. Mrs. Traer knew that her husband was a trustee holding the assets for the stockholders of the company and knew their value, and was guided in her purchase by his advice and direction.

11. She knew that Tappan was ignorant of the value of the assets and had knowledge of the devices used by her husband to secure the purchase of the stock and dividends.

We conclude that the property was purchased by means of the fraudulent concealments and misrepresentations of Traer,

 Clews v. Traer.

of which his wife had knowledge and in which she participated, and that both are liable for the value of the property purchased through their frauds, less the sum paid therefor.

III. We will proceed to notice the objections urged by defendants' counsel to the proceedings and decree of the court below not disposed of by our conclusions upon the facts.

It is insisted that the amendment to plaintiff's petition last filed was made without authority of law and must be eliminated in this court. The objection is based upon the following facts: The trial of the cause was commenced on the 3rd day of February, 1880, and by agreement was continued in vacation. On the 9th day of February, in vacation, the plaintiff had leave to file the amendment in question. This, it is insisted, was without authority of law for the reason that a judge in vacation has no authority to permit amendments. The cause was tried upon a stipulation in the following words:

2. TRIAL:
stipulation
for before
judge:
amendment.

"It is stipulated that the hearing and argument of this cause be had before Hon. John McKean, judge of said court, at Cedar Rapids, in said county, commencing Tuesday, February 3d, at 9 o'clock A. M., and continuing from day to day until the hearing and argument are completed. Depositions may be filed by said judge, together with motions to suppress the same, or exceptions thereto, with the same effect as though filed in open court or by the clerk thereof, and the same action may be had thereon, and on all other motions and interlocutory matters, before said judge, as in open court, and the acts and doings, rulings and decisions of said judge on the hearing before him shall be spread upon the records of the court and shall stand in all respects as the action of the court; all of the parties to said suit hereby expressly waiving all objections for irregularity, if any there be, because of such hearing, action and decisions before the said judge instead of the court; final decree shall be entered by the court as in other cases, upon the

Clews v. Traer.

hearing and argument herein provided for before said judge, as though the same was made in open court."

Under the terms of this stipulation the judge was authorized to pass upon all motions and interlocutory matters as in open court. All proceedings were to be the same as in a trial before the court. By this stipulation the trial was regarded as being before the court. We need not inquire what the powers of the judge respecting amendments would have been in the absence of the stipulation; with the stipulation they were the same as those conferred by law upon the court. The stipulation affords a complete and ready answer to the objection under consideration. Nothing more need be said upon this point of the case.

IV. It is insisted that this is an action to rescind the assignment of the stock and dividends, and that the action cannot be maintained for two reasons, namely:

1. Tappan cannot retain all he has received, making no complaint and maintaining his status as the contract left him, and yet, by an assignment of his claim against Traer, authorize Clews to set aside the contract.

3. FRAUD :
trustee : action for value
of property.

2. Clews has taken no steps to rescind the assignment.

These objections are made under a misapprehension of the case. It is not an action to rescind the assignment of the stock and dividends. But it is an action of a stockholder of a corporation to recover dividends due him in the distribution of its assets which are in the hands of a trustee. The assignment of the stock and dividends having been procured by the fraud of the trustee and assignee is void. Being void it cannot stand in the way of recovery by plaintiff. The trustee's act in paying the assets to Mrs. Traer being fraudulent, did not discharge him from liability to the stockholders, but she, as a party to the fraud and a recipient of the assets to which plaintiff is entitled, becomes liable therefor. Equity will pursue them in her hands. The contract of the assignment be-

 Clews v. Traer.

cause of fraud is not binding and the parties guilty of the frauds can gain no protection under it. These views are based upon the most familiar equitable principles.

Tappan having been defrauded by defendants in procuring the assignment of the stock and dividends, held a claim against them for the dividends and assets in their hands to which he was entitled. They as we have seen will be regarded as holding the assets in trust for him. This claim held by Tappan is based upon the fraud of defendants. It arose upon the transfer of the stock and dividends, and is for a tort, fraud being regarded by the law as a tort. 1 Hilliard on Torts, p. 4; 2 Id., p. 141. Claims for torts may be assigned under the laws of this State, and actions thereon may be prosecuted by the assignees. *Weire v. City of Davenport*, 11 Iowa, p. 49; *Gray v. McCallister*, 50 Iowa, 497.

As this is not an action to rescind the assignment of the stock and dividends, but is an action to recover for a fraud, a tort, neither Tappan nor his assignee, Clews, were required to take any steps looking to rescission.

The defendants cannot complain that Tappan and plaintiff hold the consideration paid for the assignment, \$1,200, and yet seek to recover the value of the dividends less \$1,200. Defendants' liability is measured by the amount of money to which Tappan would have been entitled had defendants honestly paid to him or his assignee the dividends on the stock. The \$1,200 go to defendants' credit as so much paid upon the dividends.

V. The defendants insist that the action is barred under section 5057 of the U. S. Rev. Statutes, which limits the com-
4. STATUTE OF mencement of an action by an assignee in bank-
limitations:
diligence. ruptcy to two years after the cause of action accrued. But in actions brought to recover on account of fraud the bar of the statute commences to run when the fraud is discovered. *Bailey, assignee, etc., v. Glover et al.*, 21 Wal., 342.

Clews v. Traer.

The action was commenced against J. W. Traer within two years from the time the assignment of the stock and dividends was made. But the action as to Mrs. Traer was not commenced within that time. The last amended petition filed by plaintiff alleges that the connection of Mrs. Traer with the fraud complained of was not discovered until September 24, 1879, and before that date plaintiff had no knowledge thereof.

Counsel for defendants insist that the law requires plaintiff, in order to arrest the bar of the statute, to plead and show diligence used to discover the fraud and the circumstances of the discovery. We may, for the purpose of the case, admit the correctness of the rule relied upon by counsel. But no objection was raised in the court below by demurrer, or in any other manner, to the amended petition on the ground that it did not sufficiently show diligence in the discovery of the fraud. The objection to the pleading on this ground cannot be first raised in this court.

The testimony shows to our satisfaction that Mrs. Traer's connection with the fraud was not discovered until it was disclosed by testimony taken in the case. As plaintiff was ignorant of the part Mrs. Traer acted, and had no knowledge of her connection with the transaction, there was nothing to direct inquiry to her. He was not required to make diligent efforts to fasten fraud upon her when he had no intimation that she had any connection with the business.

VI. Counsel for defendant insist that when a new cause of action is set up by amendment to the petition made after the statute of limitations has fully run, the action will be barred, though when commenced it was not barred. Applying this rule, which for the purposes of this case may be admitted, counsel insist that the amendment to the petition last filed presents a new cause of action for the reason, it alleges, that the dividends due upon the stock were transferred by the assignment. The other petitions allege the transfer of the stock only, and before this amend-

5. AMEND-
MENT: new
cause of ac-
tion.

Clews v. Traer.

ment plaintiff insisted that the dividends due plaintiff when Traer was appointed trustee were not transferred by the assignment.

Counsel entertain the mistaken belief that plaintiffs' cause of action rested upon the transfer of these dividends. The cause of action is based upon nothing of the kind. It is the act of defendants in fraudulently appropriating to their own use money in their hands held by them as trustee for plaintiff. The conversion of the money to which plaintiff is entitled constitutes the cause of action. Whether the money was or was not transferred by an assignment is a matter of evidence to be considered in determining whether it was fraudulently transferred. The transfer by the assignment is pleaded and relied upon by defendants as a fact showing that there was no fraudulent appropriation of plaintiff's money. This transfer and assignment, therefore, instead of being the *cause of action* of plaintiff is a matter of defense relied upon by defendant. The point demands no further notice.

VII. The separate consideration of many points discussed by counsel on both sides of the case is rendered unnecessary in view of the fact that they are disposed of by the conclusions we reach in other branches of the case. And many questions argued by counsel are not involved in the facts as we find them from the evidence.

Plaintiff claims that he is entitled to a judgment for a sum greater than he received in the court below. We think the amount of the decree of the Circuit Court is approximately correct and ought not to be changed.

AFFIRMED.

GARRETSON V. BITZER.

1. **Burden of Proof: CONTRACT: PLEADINGS.** The plaintiff claimed a certain sum as still due under a contract of sale, set out in the petition. The defendant denied all indebtedness on account of the contract declared on, and set forth substantially the same contract, alleging payment in full. *Held*, that the burden of proof was upon the plaintiff to establish the fact of indebtedness.
2. ———: **EVIDENCE: FINDING OF COURT.** The finding of the court that the plaintiff had failed to establish his claim by a preponderance of evidence, when not opposed to the evidence, will not be disturbed.
3. ———: ———: **IMMATERIAL.** Evidence tending to show how plaintiff understood the contract before the trade was consummated, but not shown to have been communicated to the defendant, and which would not throw any light upon the real contract between the parties, was properly rejected.

Appeal from Muscatine Circuit Court.

THURSDAY, DECEMBER 15.

THE plaintiff claims of the defendant the sum of three hundred dollars, and alleges as a ground of such claim that he sold and conveyed to the defendant certain real estate for the consideration of two thousand dollars, and that there is due and owing to the plaintiff on account of said sale the sum of three hundred dollars. The defendant filed an answer denying that there is due and owing to the plaintiff the sum of three hundred dollars, or any other sum, on account of said contract and sale, and alleging "that the original agreement between said parties for the sale by plaintiff and the purchase by defendant of said lot was, by mutual consent, modified and changed as follows: that defendant agreed to give, and plaintiff agreed to accept, as full payment for said premises, the following, to-wit: ten shares of stock of the Muscatine National Bank, three hundred dollars in money, and defendant's note for seven hundred dollars, at fifteen days' time; and that pursuant to, and in fulfillment of, said contract the defendant transferred, paid, executed, and delivered unto plaintiff the

Garretson v. Bitzer.

said stock, money, and promissory note, and the plaintiff then and there accepted the same as full payment for said premises, and delivered to defendant his conveyance of said premises."

Subsequently the defendant filed an amendment to his answer, as follows:

"The defendant says that on or about the 12th day of October, 1878, the plaintiff offered and agreed to sell and convey unto the defendant the aforesaid premises for the following consideration, to wit: three hundred dollars in money; the promissory note of this defendant, at fifteen days' time, for seven hundred dollars; and the transfer and assignment by defendant to the plaintiff of certain shares of the capital stock of the Muscatine National Bank, then held by and standing in the name of the defendant on the books of said bank, which said offer and agreement were accepted by the defendant; and pursuant thereto, and in fulfillment thereof, the plaintiff executed and delivered unto the defendant his deed and conveyance of said premises; and the defendant paid, executed, delivered, and transferred unto the plaintiff the aforesaid money, promissory note, and bank stock in full payment and satisfaction of said agreement and for said conveyance, and the same were so accepted and received by the plaintiff."

The cause was tried to the court, and judgment was rendered in favor of the defendant. The plaintiff appeals.

J. Scott Richman and Brannan & Jayne, for the appellant.

J. Carskadden and Hoffman, Pickler & Brown, for appellee.

DAY, J.—I. In determining the case the court held that the burden of proof was upon the plaintiff, and that he must fail because he had failed to establish the facts essential to his recovery by a preponderance of evidence. It is insisted that in this ruling the court erred. It is claimed that the answer of the defendant

1. BURDEN OF
proof: con-
tract: plead-
ing.

Garretson v. Bitzer.

is in the nature of a confession and avoidance, and that the burden of proof is upon the defendant to establish payment in full as alleged in the answer. It is to be observed, however, that the defendant does not admit in his answer that he agreed to pay the plaintiff two thousand dollars for the land in controversy, or that there ever was due the plaintiff three hundred dollars on the contract. The defendant simply sets up this agreement, as he understands it, and alleges that he has complied with it. It was not incumbent upon the defendant, in order to defeat the plaintiff's claim, to prove this agreement, and a compliance with it. The substantial issue, and which involves the merits of the case, is whether there is due the plaintiff three hundred dollars on the contract of purchase. The plaintiff alleges that such sum is due. The defendant denies that that sum or any amount is due. The plaintiff cannot recover without proving some amount due. The burden of proof is upon the plaintiff to establish that fact. The court did not err in holding that the plaintiff must establish his claim by a preponderance of testimony.

II. The plaintiff was president of the Muscatine National Bank, which on the 9th of October, 1878, was in process of liquidation. The defendant owned ten shares of \$100 each in this bank. On the 9th of October, 1878, the plaintiff informed the defendant that there was a dividend of thirty per cent of his shares of the capital stock at the bank to be refunded to him. On the same day the defendant went to the bank to draw his dividend, but was unable to do so, because he did not have his certificate of stock with him. The next morning, October 10, the defendant drew his stock dividend of \$300, which fact was indorsed on his certificate of stock. At the same time he deposited the amount of his dividend with G. A. Garretson & Co., bankers, successors to the Muscatine National Bank, the Garretson of that company being the plaintiff. On the 12th day of October, the plaintiff sold to the defendant the land in question, accepting in pay-

2. ——— : evidence : finding of court.

Garretson v. Bitzer.

ment \$300 in money, the defendant's note for \$700, and the defendant's stock in the Muscatine National Bank. The whole controversy between the parties arises over this dividend of \$300, which was paid to the defendant before the trade was effected. The plaintiff insists that he was to have ten full shares of defendant's stock at par, and that when he made the trade he did not know that the defendant had withdrawn a dividend of \$300 on his stock. Upon the other hand, the defendant insists that the agreement was that he was to give for the land \$300 in money, his note for \$700, and his bank stock; that he did not understand when he made the trade that the dividend was to go to Garretson, and that he would not have agreed to trade at all if he had known Garretson wanted the dividend. Upon this issue there is a direct conflict in the evidence. The burden of proof is, as we have seen, upon the plaintiff. In our opinion the court correctly held that the plaintiff had failed to establish his claim by a preponderance of testimony. Besides the finding of the court upon a question of fact stands as the verdict of a jury, and will not be disturbed unless so clearly opposed to the evidence as to indicate that it was the result of passion or prejudice. The finding in this case is not so opposed to the testimony.

III. The court held that the parties understood the agreement differently; that the plaintiff had reason to suppose that the defendant understood he was at liberty to draw the dividend of \$300, and that it was not to be included in the transaction; and that under section 3652 of the Code, that sense is to prevail against the plaintiff, in which he had reason to believe the defendant understood it. It is claimed that the court erred under the evidence, in holding that the plaintiff had reason to suppose that the defendant understood he was at liberty to draw the dividend. If the court did so err, it was clearly error without prejudice. The court would not have been justified in finding from the evidence that the defendant had reason to suppose that the plaintiff understood the

Garretson v. Bitzer.

defendant was not at liberty to draw the dividend. We would then have a case in which neither party had reason to believe the other understood the contract in a sense different from that in which he himself understood it, and consequently a case to which section 3652 would not apply. Independently of that section the real contract must be determined from the evidence. But the court found that the plaintiff had failed to prove the contract as he alleged it. So that even if section 3652 does not apply, the general result is not affected.

IV. On the trial the plaintiff introduced one Lyman Banks as witness, and asked the following questions: "Do you a. ____; ____; know whether or not during that time, when the immaterial. the parties were negotiating, Mr. Garretson made any inquiry about the payment of this dividend? State whether or not Mr. Garretson came to the bank before this trade was consummated to see whether this dividend had been paid?" These questions were objected to as incompetent and immaterial. Thereupon the plaintiff stated that he proposed to show by the witness "that while plaintiff and defendant were negotiating, and before the trade was consummated between them, Mr. Garretson went to the bank and inquired if Mr. Bitzer had drawn his dividend upon the stock, and was informed that he had not." To all of this, both question and showing, the defendant objected, and the objection was sustained. This action of the court is assigned as error. We think the ruling of the court is correct. The proposed evidence would have shown that the plaintiff was deceived by the bank of which he was president, and would have tended to show that he expected to get the dividend. But it would not tend to throw any light upon the real contract between the parties. It is to be observed that it was not proposed to show that the fact of this inquiry and information was communicated to the defendant. The defendant can in no way be bound by it. Besides, the court states in its opinion that, having doubts as to the correctness of the exclusion of this

 Parkhurst v. Masteller.

evidence, it has given the plaintiff the full benefit of his offer to prove the facts stated, and has regarded them as proved.

We discover no error in the case. The judgment is

AFFIRMED.

PARKHURST V. MASTELLER.

57	474
87	627
57	474
91	584
91	584
57	474
93	787
57	474
106	5

1. **Malicious Prosecution: EVIDENCE BEFORE GRAND JURY.** In an action for malicious prosecution, a grand jurymen was asked on cross-examination, if the evidence of the defendant, then the prosecuting witness, was taken into consideration by the jury in finding the indictment. *Held*, improper.
2. ———: **EVIDENCE: OPINION OF WITNESS: AT TIME OF TRIAL.** Where a witness had stated his opportunities for observation, and that he saw no fire, a question calling for his opinion at the time of the trial, as to whether or not there was a fire at the time and place referred to, was properly excluded.
3. ———: **INSTRUCTION: FOLLOWED IN THE SENSE INTENDED.** Where an instruction was intended in a correct sense, and was understood and followed by the jury in the sense intended, the case will not be reversed because the language used, technically construed, might have a different meaning.
4. ———: ———: **PROOF OF GUILT.** In an action for malicious prosecution, if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty, no recovery can be had; and in view of the evidence of actual guilt in this case, the instruction as to belief and probable cause should have been so qualified.
5. ———: ———: **ADVICE OF COUNSEL: BAD FAITH.** An instruction that if counsel and client acted in bad faith in the prosecution, the advice of counsel would not constitute a defense, was not prejudicial error, though there was no evidence that the counsel acted in bad faith.
6. ———: ———: **DAMAGES: ATTORNEY'S FEES.** Where there was no evidence of the amount paid, or agreed to be paid, as attorney's fees in defending the prosecution, an instruction including such costs in the measure of damages was erroneous.
7. ———: ———: **MENTAL SUFFERING.** In an action for malicious prosecution, mental suffering, not arising directly from bodily suffering, and injury to the feelings, constitute elements of actual or compensatory damages.

Parkhurst v. Masteller.

8. —: —: **EXEMPLARY DAMAGES.** In addition to damages for injury to the feelings, exemplary damages may be allowed in a proper case, strictly by way of punishment.

Appeal from Mahaska Circuit Court.

SATURDAY, DECEMBER 17.

ACTION for damages for malicious prosecution. There was a trial by jury, and verdict and judgment were rendered for plaintiff. The defendant appeals.

Lafferty & Johnson, for appellant.

Bolton & McCoy, John F. Lacey, and M. E. Cutts, for appellee.

ADAMS, CH. J.—I. The defendant was the prosecuting witness in a criminal action against the plaintiff, for maliciously burning a quantity of hay belonging to the defendant. The malicious prosecution for which the plaintiff claims damages, was the prosecution of that action. For the purpose of showing that the action was prosecuted without reasonable cause, the plaintiff introduced as a witness one Jackson, who testified that he was foreman of the grand jury which found the indictment against the plaintiff for maliciously burning the defendant's hay; that the defendant was examined as a witness before the grand jury. He also testified as to certain statements made by defendant in his testimony before the grand jury.

The defendant's counsel, upon cross-examination, then asked Jackson a question in these words: "State if in the discussion of the case before the grand jury on the part of the gentlemen composing it, whether Mr. Masteller's evidence was spoken of, or taken into consideration in passing upon it." This question was objected to by plaintiff, and the objection sustained. In sustaining the objection the defendant claims there was error.

The evidence, we think, was rightly excluded for this reason

Parkhurst v. Masteller.

if for no other, that it is impossible in the nature of things, for one jurymen to know whether certain evidence was taken into consideration by the other jurymen. The most he could know would be what they said about it.

II. Witnesses were examined by the plaintiff who testified that they saw the fire in the fore part of the evening of the night on which the hay was burned. For the purpose of rebutting this testimony, and showing that the fire broke out not earlier than about twelve o'clock that night, the defendant introduced as a witness, one Barr, who testified that he was out that night between eleven and twelve o'clock, and was about one mile from the hay; that he was on rather high ground, and thinks that there was nothing to obstruct his view in the direction of the hay, and that he saw no fire. He was then asked by defendant's counsel a question in these words: "What would you say now under the circumstances then, as to whether there was or was not a fire at Masteller's hay at that time?"

The plaintiff objected to this question, and the objection was sustained. In excluding the evidence the defendant claims that the court erred.

We think that the most that the witness could properly be allowed to state, were the facts as to his opportunity for seeing the fire, if he had looked in the direction of the hay and it had then been burning; whether he looked in that direction; and whether he saw any fire. After he had stated the facts, it was for the jury to form an opinion and not the witness, as to whether the hay was burning at that time. In refusing to allow the question to be asked, we think, that there was no error.

III. The court instructed the jury that "before the plaintiff can recover in this cause, he must show by a preponderance of the testimony that the defendant instituted and commenced a criminal prosecution against him for the crime of arson." The defendant insists that

2. ———: evidence: opinion of witness.

3. ———: instructions: followed as intended.

Parkhurst v. Masteller.

if the jury had followed this instruction, their verdict must necessarily have been for him, because it was undisputed that the criminal prosecution was for burning hay, which is not arson.

The crime for which the plaintiff was prosecuted is spoken of in the pleadings by both plaintiff and defendant as arson. The court evidently used the word in the same sense, and the jury must have so understood it. Where a jury follows an instruction in the sense in which it was intended, we cannot reverse, because they did not follow it in a sense in which it was not intended.

IV. The court gave an instruction in these words: "The question of probable cause does not depend upon the question, 4. — : — : whether the plaintiff was guilty in point of fact, ^{proof of guilt.} nor whether the defendant in fact believed him guilty, but the question is were the facts and circumstances within the defendant's knowledge, and upon which he acted, sufficient in themselves to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man, and did defendant believe plaintiff guilty?" The defendant claims that in giving this instruction the court erred. He claims the law to be that if the plaintiff was in fact guilty, he had reasonable cause for the prosecution even though his information was such that he should not have believed, and did not believe him to be guilty; and if the evidence in this case was such that the jury believed that the plaintiff was guilty, notwithstanding his acquittal in the criminal action, such belief on the part of the jury would alone entitle the defendant to a verdict.

The statement contained in the instruction, that "the question of probable cause does not depend upon the question whether the plaintiff was guilty in point of fact," is certainly correct to this extent, that there might be probable cause, and the plaintiff not be guilty. Some of us are inclined to think that this is all that the court intended to hold. But it is possible that the court intended also to hold that there might be

Parkhurst v. Masteller.

a want of probable cause, even though the plaintiff was guilty. The instruction is assailed by defendant upon the ground that it is susceptible of this meaning.

According to the weight of authority the rule appears to be, that if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty of the crime with which he was charged, no recovery can be had. *Bacon v. Town*, 4 Cush., 239; *Adams v. Lisher*, 3 Blackf., 241; *Whitehurst v. Ward*, 12 Ala., 264; *Bell v. Percy*, 5 Ired., 83; *Johnson v. Chambers*, 10 Id., 287.

V. Error is assigned upon another part of the same instruction and that is the part pertaining to the defendant's belief. There might be a want of probable cause, and a belief on the part of the defendant that the plaintiff was guilty. Whether the existence of such belief would exclude malice and thereby prevent a recovery we do not determine. Such question is not presented.

But the thought of the instruction appears to be that to constitute probable cause, there should be both belief in the mind of the prosecutor of the guilt of the accused and reasonable grounds for the belief, or at least there should be sufficient facts and circumstances known to the prosecutor to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man.

In view of the evidence introduced to prove actual guilt, we think that the instruction should have been given with the qualification that no recovery could be had if the jury believed the plaintiff actually guilty.

VI. The evidence showed that the defendant in instituting the prosecution acted under the advice of counsel. The court,

5. — : — : after having given an instruction embodying the advice of counsel: bad faith.

cases to persons who act in good faith under the advice of counsel, given upon a full statement of all the known facts, added by way of qualification these words: "If counsel

Parkhurst v. Masteller.

and client acted in bad faith, originating and urging the prosecution, then the advice of counsel would constitute no ground of defense." The defendant insists there was no evidence whatever tending to show that the counsel did not act in good faith; that there was therefore no question of this kind before the jury, and that it was error to instruct them upon the supposition that there was. The defendant is undoubtedly correct in his position that there was no evidence of a want of good faith on the part of the counsel, and it might properly enough be held that the instruction upon this point was uncalled for, but we are unable to see how the defendant was prejudiced. The court instructed the jury that, "if counsel and client acted in bad faith, originating and urging the prosecution, then the advice of counsel would constitute no ground of defense." Now the instruction was not prejudicial we think, because if the client alone acted in bad faith he could not shield himself under the advice of counsel. The implication then that he might enjoy the immunity, unless both acted in bad faith is too favorable to the defendant.

VII. On the measure of damages the court instructed the jury in these words: "The plaintiff would be entitled to recover: —: —: cover his actual damages, which would include the damages: attorney's fees. costs he incurred in defending the prosecution (if any have been shown), his loss of time, and interruption to his business.

The only evidence that the plaintiff incurred costs is his own statement, as a witness, that he was compelled to employ counsel to defend him. Such being the fact the defendant contends that the evidence did not justify the instruction, and in this it appears to us that the defendant's position is well taken. It may be, as the plaintiff contends, that the fact that he was compelled to employ counsel entitled him to a nominal recovery for counsel fees, even in the absence of any evidence as to the reasonable amount paid or agreed to be paid. But the instruction was evidently not drawn with the view of suggesting any

Parkhurst v. Masteller.

such idea to the jury, and we think no such idea was suggested. The effect of the instruction was, we think, to send the jury off into the region of conjecture as to the amount of counsel fees, and this was not allowable.

VIII. In the same instruction the court told the jury that actual damages would include compensation for bodily and mental suffering. In this it is insisted that the court erred.

There was no evidence we think of bodily suffering, but the instruction is not objected to upon this ground. The objection
7. — : — : is that mental suffering not arising directly from
mental suf-
fering. bodily suffering or disability does not constitute a
ground for actual compensatory damages.

It is sufficient to say that upon a careful consideration of this question by this court in *McKinley v. The C. & N. W. R. Co.*, 44 Iowa, 319, it was held otherwise. The defendant's objection therefore cannot be sustained.

IX. The court instructed the jury that exemplary damages might also be allowed. In this the defendant contends that
8. — : — : there was error. He insists that the court having
exemplary
damages. instructed the jury that damages for mental suffering might be allowed as compensatory, there were no damages in the case allowable as exemplary. His argument is, if we understand him, that the only damages which could be regarded as allowable as exemplary would be the damages for mental suffering, but as they had been allowed as compensatory they could not be allowed as exemplary without the allowance of the same damages twice. The defendant cites *Hendrickson v. Kingsbury*, 21 Iowa, 387; *Chiles v. Drake*, 2 Met. (Ky.), 146. See also in this connection, *Fay v. Parker*, 53 N. H., 342; *Detroit Daily Post v. McArthur*, 16 Mich., 447.

We do not care to go into an elaborate discussion of the vexed question of compensatory and exemplary damages. While it may be true that this court would include within compensatory damages all that some other courts would regard as constituting a basis for the allowance of exemplary damages,

Deller v. The Plymouth County Agricultural Society.

as injury to the feelings, etc., resulting from the defendant's guilt, and where there is no standard by which the injury can be measured and compensated, yet the doctrine of exemplary damages has always been recognized by this court, and it is too late to overturn it now. In addition, therefore, to damages for injury to the feelings there may be allowed in a proper case damages strictly by way of punishment.

Some other errors are assigned which we have not considered. The questions presented will probably not arise upon another trial.

REVERSED.

57	481
134	220

DELLER V. THE PLYMOUTH COUNTY AGRICULTURAL SOCIETY.

- 1 **Agricultural Fair: HORSE-RACING: PREMIUMS.** A county agricultural society has the power, under section 1109, Code, to offer a premium to the winner at a horse-race, or trial of speed, to be held on its grounds during its annual fair.
2. —: —: —. Section 1114, Code, does not prohibit trials of speed or horse-racing, when under the control of the society, and as a means for improving the stock of horses.
3. —: —: —: **GAMBLING: PUBLIC POLICY.** The offering of a premium is not a bet or wager, and is not within the provisions of section 4028, Code, nor is it against public policy.
4. —: —: —: **PREMIUM: WHO ENTITLED TO.** Where a party has control of a horse and enters him for the race in accordance with the rules of the society, paying the entry fee, he is entitled to the premium if earned.
5. —: —: —: **NOTICE AND PROTEST.** The notice and protest to the officers of the society by the plaintiff, as to the disqualifications of the horse making the best time, were sufficient to estop the society from paying the premium to its owner.

Appeal from Plymouth Circuit Court.

SATURDAY, DECEMBER 17.

THE petition states the defendant has the power, and under the statute holds fairs, and that in October, 1880, one of such

Deller v. The Plymouth County Agricultural Society.

fairs was held, and as "an inducement to owners and persons having charge of horses to attend and enter their animals, the said defendant issued printed offers of premiums, among which offers was one of \$50, first money for the best three in five, free for all trotting, and was open to all horses owned in the county of Plymouth, Iowa, and not otherwise." * * *

That at said time the plaintiff had in his charge a trotting mare owned by ——— Cameron, then residing in said county, * * which mare was entered by plaintiff for the said race above referred to, in accordance with the rules of the defendant society, he paying the required entry fee, and thereby becoming entitled to participation in the race;" that among the horses so entered was one owned from Woodbury county, which horse "made the fastest time, and the horse in charge of and entered by plaintiff made the next best time; that after and before said race the plaintiff notified the proper officers of said fair, to-wit. the officers of defendant, "that the Woodbury county horse was not entitled to contest for the premium offered, and after said race the said plaintiff entered with the secretary of defendant his oral protest against the owner of the Woodbury county horse being paid the said award * * upon the ground that he * * was, and had been, a resident of Woodbury county." Notwithstanding which the premium was paid to the owner of the last named horse. There was a demurrer to the petition which was overruled, and defendant appeals.

Argo & Kelly, for appellant.

I. S. Struble, for appellee.

SEEVERS, J.—I. As contemplated by statute, in cases where the amount in controversy is less than one hundred dollars, certain questions have been certified upon which it is said to be desirable to have the opinion of the Supreme Court, among which are the following:

1. AGRICULTURAL fair: horse-racing: premiums.

Deller v. The Plymouth County Agricultural Society.

"1. Does section 1114 of the Code of 1873 prohibit horse-racing at county agricultural society fairs, and on its grounds, such as is contemplated by the petition in this case?"

"2. Is an agreement, such as is alleged in the petition, made by such society with the owner of a trotting horse, whereby said society promises to pay a sum of money to the winner of the race, against public policy?"

"3. Can the plaintiff maintain an action for the recovery of money won on such race, as is contemplated and described in said petition?"

It is provided by statute: "All county agricultural societies shall annually offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may deem proper. And they shall so regulate the amount of premiums and the different grade of the same, that small as well as large farmers and artisans may compete therefor." Code, § 1109.

It is insisted this section does not confer upon agricultural societies the power to "offer a premium to the winner at a horse-race to be held on its grounds during the continuance of its annual fair." It is made the duty of such societies to "offer and award premiums for the improvement of stock." That an improvement in the size, strength, and capacity of horses is desirable there can be no doubt. Why not also in speed? Counsel practically concedes this is so but say such an improvement is less desirable than "weight, strength, style, and tractability." This may be true, but why should "style" be regarded as a more desirable improvement than speed. However this may be, the defendant, we think, had the power to determine that to increase the speed of horses was a desirable improvement. The means by which this was to be accomplished is discretionary. That is, the society must determine in what way the desired result can be best reached. Should it be thought best to offer a premium for a trial of strength,

Deller v. The Plymouth County Agricultural Society.

the society has the power to do so. It follows, we think, a premium may be offered for a trial of speed. It matters not what it may be called, unless it is prohibited by statute, or is contrary to public policy.

But it is said that no one but farmers and artisans can compete for the premiums. This we do not think is the proper construction of the statute. The premiums and grades are to be so arranged that all farmers and artisans may compete therefor. But other persons are not prohibited from competing, and we think the object of the statute is to encourage development and progress, and that competition is open to all persons instead of being confined to a class or classes.

Section 1114 of the Code is as follows: "No person shall be permitted to sell any intoxicating liquors, wine, or beer of 2 —; —; any kind, or be engaged in any gambling or — horse-racing, either inside the enclosure where any county or district [or State] agricultural society fair is being held, or within one hundred and sixty rods thereof, during the time of holding such fair; and any person found guilty of any offense herein enumerated shall be fined in a sum not less than five nor more than fifty dollars for every such offense.

This section does not in terms prohibit the society from allowing trials of speed or horse-racing as a means of improving the stock of horses. The word person may include corporations. Code, § 45. But in order to ascertain the meaning of the statute under consideration, it must be read and construed in connection with section 1109 of the Code, before quoted. We have seen that under the last section agricultural societies have the power to offer and award premiums for the improvement of the speed of horses, and as a means to this end they may allow horse-racing. This being so, we do not think the prohibition in this respect in section 1114 applies to races for the purpose aforesaid, when controlled by the society. It seems to us if the General Assembly had intended to prevent such societies from offering premiums for

Deller v. The Plymouth County Agricultural Society.

the fastest horse to be tested by a race, it would have so said in language that could not be misunderstood.

Gambling, or the making of any bet or wager, is prohibited by statute, Code, § 4028; but horse-racing is not, except on a

3. —: public highway. Code, § 4071. The offering of
gambling:
public policy. a premium is not a bet or wager. "In a wager or

bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must lose or win. In a premium or award, there is but one party until the act, thing or purpose for which it has been offered has been accomplished. A premium is an award or recompense for some act to be done. A wager is a stake upon an uncertain event." *Alvord v. Smith*, 63 Ind., 58; *Hams et al. v. White*, 81 N. Y., 532. The only case coming under our notice which apparently holds otherwise is *Bronson Agricultural and Breeders Association v. Ramsdell*, 24 Mich., 441. In that State, however, there was a statute prohibiting "all running, trotting or pacing of horses * * * for any bet * * * or award," and it was made a penal offense to contribute or collect any "money, goods or things in action for the purpose of making up a purse, plate, or other valuable thing to be raced for * * * contrary to law." This statute is much broader than ours and therefore the cited case is not applicable.

From what has been said it is apparent the transaction set forth in the petition is not contrary to public policy.

The two first questions must be answered in the negative, and the third in the affirmative.

II. The fourth question is as follows. "Do the facts stated in the petition show the plaintiff to be the real party in interest and entitled to sue for the money in question in this case?" The plaintiff had charge of and entered the mare for the race. He paid the entry fee and thereby became entitled to the premium if earned. This question must be answered in the affirmative.

4. —: premium: who
entitled to. this case?"

 Richmond v. Shickler.

III. The fifth is as follows. "Is notice and protest given by plaintiff to the officers of the defendant, as set forth in the s. —: —: petition, sufficient to estop the defendant from paying (the money offered to the winner) to the owner of the horse called Woodbury Chief, or otherwise incur a liability to the plaintiff?"

The averment in the petition is in effect the same as if it had been stated that notice was given to the defendant.

This on demurrer would have been clearly sufficient. It is possible that on motion the plaintiff would have been compelled to state to what officer or person the notice was given.

This question must be answered in the affirmative.

AFFIRMED.

RICHMOND V. SHICKLER ET AL.

1. **Intoxicating Liquors: ACTION FOR DAMAGES: JOINT AND SEVERAL LIABILITY.** Under the pleadings and evidence in this case, an instruction that if defendant sold beer to plaintiff's husband, which with beer sold him by others produced "fits of intoxication," he was liable for all the damage caused thereby, was erroneous. The persons furnishing the liquor were not joint wrong-doers, but each was severally liable for the damage caused by his own acts.
2. —: —: **LICENSE: SURETY ON BOND.** Where the defendant was licensed by an incorporated town to sell ale, wine and beer, and gave a bond with surety to pay any damage any person might sustain by reason of his sale of beer or liquor, the surety would be liable thereunder for all damages recoverable, whether compensatory or exemplary, not exceeding the amount of the bond.

Appeal from Marshall District Court.

SATURDAY, DECEMBER 17.

ACTION by a wife to recover damages caused by sales of wine, beer and ale, to her husband, whereby she was injured in

Richmond v. Shickler.

her person and means of support. Judgment was rendered on the verdict for the plaintiff and defendant appeals.

James Allison and O. Caswell, for appellants.

P. M. Sutton and A. P. Lowery, for appellee.

SEEVERS, J.—It is stated in the petition that the defendant Shickler, sold plaintiff's husband "wine, beer and ale, from time to time" for the period of two years last past, "causing the oft and repeated intoxication" of her said husband. The evidence tended to support the allegations of the petition and also to show that during said time the plaintiff's husband procured intoxicating liquors of other persons which contributed to produce the intoxication of which the plaintiff complains. The court instructed the jury as follows:

1. INTOXI-
CATING
liquors: ac-
tion for dam-
ages: joint
and several
liability.

"6. If, therefore, under the instructions above given, you find the plaintiff entitled to recover damages against the defendant, it will not be necessary for her to show that the defendant sold to her husband all the beer which he used, and which might produce his intoxication. If the defendant sold beer to Richmond, which together with other beer sold him by others, produced his intoxication, and the plaintiff was injured thereby, she will be entitled to recover from the defendant the whole damage caused by such fits of intoxication as he aided to produce. But if she has sustained damage from the intoxication of her husband, which intoxication was caused by beer purchased wholly of others than the defendant, then she will not be entitled to recover for such damage."

It was held in *Woolheather v. Risley*, 38 Iowa, 486, when intoxicating liquors were procured of different persons, during the same period of time, a recovery could be had of any one of such persons who contributed to the intoxication produced by the liquors so furnished. It was not determined in that case that one of such persons was liable for the whole damages

Richmond v. Shickler.

caused by the intoxication to which several persons contributed. In *Ennis v. Shiley*, 47 Iowa, 552, and in *Engleken v. Wibber*, Id., 558, it was held that whoever contributes to the habit of intoxication is only liable for the damages caused by his own acts.

In *Kearney v. Fitzgerald*, 43 Iowa, 580, it was held that whoever contributes to a single act of intoxication, whereby distinct damages are caused, is a joint wrong-doer and is liable for the whole damages. See also *La France v. Krayner*, 42 Iowa, 143; *Jewett v. Wanshura*, 43 Id., 574, and *Hitchner v. Ehlers*, 44 Iowa, 40.

The instruction under consideration directs the jury that if the defendant sold the plaintiff's husband beer which caused "fits of intoxication," to which others contributed, he was liable for all the damages caused thereby. By the use of the words "fits of intoxication," the court no doubt meant repeated or different acts of that character. It may be when several different persons contribute to distinct acts of intoxication they would be joint wrong-doers and each would be liable for the whole damages. But as no such case is presented by the record before us, such question is not determined.

The correctness of the instruction must be determined by reference to the allegations of the petition and evidence introduced on the trial. The petition does not allege there was any specific act or acts of intoxication to which *all* the persons from whom the plaintiff's husband obtained liquor contributed, and the evidence tended to show he was in the habit of becoming intoxicated for the period of seventeen years preceding the trial, and that during the period named in the petition he procured liquor from any person who would let him have it. Under such circumstances the persons furnishing the liquor cannot be deemed joint wrong-doers, but each are severally liable for the damages caused by his own acts. The instructions under consideration was therefore erroneous.

II. The defendant Shickler was licensed by the incorpora-

 Richmond v. Shickler.

ted town of State Center to sell wine, beer and ale. Before he could obtain such license he was required and he gave a bond

2. —: —: with the defendant Bader as his surety, which was
 license:
 surety on
 bond.

conditioned among other things that defendants would "pay any damage any person may sustain, or which may result from the drinking of any wine or beer, or any liquor got or procured at his saloon or place of business." The court instructed the jury that both defendants were liable under the statute for exemplary damages. This is said to be erroneous as to the defendant Bader. But we think Bader is liable under the conditions of the bond for any and all damages the plaintiff is entitled to recover not exceeding the penalty of the bond.

On its face the bond is unlimited as to time and there was no evidence introduced on the *trial* tending to show for what period of time the license was issued. The appellants insist that all or some of the acts of intoxication, for which damages are claimed, were caused either before the bond was given or after all liability thereunder had ceased. We are unable to say in the state of the record that the court erred in giving the instruction aforesaid.

III. We are not entirely agreed as to whether the declarations of Hall were admissible, but as the plaintiff can obviate the objection on the re-trial by asking Hall whether he made such declaration, we deem it best not to determine the question presented at this time. There are other errors discussed by counsel but as they will not likely arise on the re-trial it is not deemed necessary to determine them.

REVERSED.

Tiffany v. Henderson.

TIFFANY V. HENDERSON.

1. **Practice: APPEAL: BILL OF EXCEPTIONS.** Where time was given in which to file a bill of exceptions, the fact that the appeal was perfected before the same was filed, would not preclude the court from settling and signing the bill. A party can appear in the court below and have the record corrected after an appeal has been perfected.
2. ———: **AMENDMENT: WHEN ALLOWED.** Under the issues and circumstances of this case, an amendment conforming the allegations of the petition to the facts proved though offered after the argument of counsel, was proper and should have been allowed.

Appeal from Scott Circuit Court.

SATURDAY, DECEMBER 17.

ACTION to recover possession of a horse. The ground of recovery stated in the petition is that plaintiff was the owner of the horse and therefore entitled to the possession. The answer denied knowledge of plaintiff's ownership, and alleged the defendant was entitled to possession under a contract with a former owner, whereby the defendant was entitled to a lien on the horse for certain money due him by such owner.

In a reply the plaintiff pleaded the defendant was estopped from setting up such lien or that he was entitled to possession. Trial by jury, verdict and judgment for defendant, and plaintiff appeals.

Clark & Heywood, for appellant.

Stewart & White and *J. J. Parks*, for appellee.

SEEVERS, J.—I. Counsel for the appellee have filed a motion to strike the bill of exceptions from the record because the case

1. **PRACTICE:** was pending in this court at the time it was signed appeal: bill of exceptions and filed. In support of the motion *Loomis v. McKenzie*, ante, 77, and *Carmichael v. Vandebur*, 51 Iowa, 225, are cited. These cases simply hold that after an appeal

Tiffany v. Henderson.

has been taken and perfected the court below has no power to entertain a motion to correct the proceedings, and possibly it may be said the court cannot make any determination in the case, because the cause has been removed to this court. The cases cited do not meet the requirements of the one before us. In the present case a motion for a new trial was overruled on the 2d day of May, 1881, and time was given the plaintiff to file a bill of exceptions on or before the 16th day of said month, on which day the same was signed and filed. On the 2d day of May, 1881, the plaintiff perfected an appeal to this court.

We have several times held on motion, where no opinion was filed, that although an appeal had been perfected a party might appear in the court below and have the record perfected. It is not essential to this right that leave should be given by this court. The essential thing being to have the record perfected. Substantially that is what was done in this case. The Circuit Court made no ruling nor did it take jurisdiction of the case, except to do that which it had stipulated might be done. The motion must be overruled.

II. The horse in question at one time was the property of Jas. M. Beardsley. To sustain the issue on his part plaintiff introduced in evidence an absolute bill of sale of the horse from Beardsley to him and rested. Thereupon the defendant introduced evidence tending to show that while the bill of sale was absolute on its face it in fact was a mortgage. Whereupon plaintiff admitted such to be the fact.

At the close of the argument of the counsel of the defendant to the jury, counsel for the plaintiff were informed that an instruction in substance had been asked, that if the jury found the plaintiff had a lien on or qualified interest in the horse instead of being the owner, as alleged in the petition, he could not recover. Upon an intimation from the court the instruction would be given, plaintiff asked leave to file an amended petition alleging that at the commencement of the action he was entitled to the

2 ———:
amendment:
where al-
lowed.

Tiffany v. Henderson.

possession of the property in said petition described, and that his interest was that of a mortgagee, and he withdraws any allegation in his petition inconsistent therewith. The court refused to permit the amendment to be filed and gave the instruction aforesaid.

Counsel for the appellant insist the instruction was erroneous as the pleadings stood at the trial, but we shall not stop to determine this question, because we think, under § 2689 of the Code, the court erred in refusing to permit the amendment to the petition to be filed so as to conform it to the established facts. It has been said more than once, by this court that to allow amendments to the pleadings is the rule, to refuse, the exception; and while a discretion in this respect is reposed in the District or Circuit Court, such discretion is of a legal character and will be reviewed on appeal. No two cases are precisely alike and therefore no beneficial result would follow from a citation of the numerous cases which support the above proposition. See, however, *Hinkle v. Davenport*, 38 Iowa, 355.

The affirmative fact that the plaintiff was a mortgagee only was not stated in the answer, although the defendant had knowledge of such fact. The first knowledge the plaintiff had the defendant would so claim was after the plaintiff had rested his case, and when this claim was made the controversy between these parties was as to who was entitled to the possession of the horse under their respective liens. So, too, under the petition and answer the issue was the same, that is, who was entitled to the possession. The ground upon which the plaintiff claimed the possession, while material, was not the main thing. The "substantial claim" was as to the possession, and this was not changed by the amendment proposed to be filed. As the defendant introduced evidence showing the plaintiff was a mortgagee he could not be prejudiced or surprised by allowing the amendment, and in fact no such claim is made.

Merritt v. Grover.

It cannot be said the proposition to amend was made too late, for we think it may be said it is never too late to amend the pleadings, if substantial justice is thereby attained and the rights of no one unduly infringed.

By allowing the amendment justice will be promoted and the real merits of this controversy determined.

REVERSED.

MERRITT ET AL. V. GROVER.

1. **Execution: EXISTENCE OF: ISSUING SECOND EXECUTION.** An execution, ordinarily, must be regarded as existing until it has been returned; and in cases where that cannot be done, it devolves upon the party in interest to allege and prove facts, showing that a second execution might lawfully issue.
2. ———: **JUDGMENT CREDITOR: PURCHASE BY.** Where the judgment creditor became the purchaser at a sale, under a second execution, issued at his instance, before the first execution was returned, he was bound to know whether such second execution was lawfully issued.
3. ———: **SALE SET ASIDE.** Where the sale under the first execution was set aside, but the levy was not, it would seem an execution could properly issue as provided by section 3086, Code.

Appeal from Chickasaw Circuit Court.

SATURDAY, DECEMBER 17.

THE petition states the plaintiff Sianda Merritt is the owner of certain real estate, which is fully described, and that Thos. J. Merritt is her husband. That in 1875 the defendant obtained a judgment against said Thomas for \$3,620.36, with interest at ten per cent, and a foreclosure of a mortgage on said real estate against both the plaintiffs.

That in February, 1879, an execution was issued on the judgment of foreclosure and levied on the real estate, and the same on March 8th, 1879, sold thereunder to the defendant for an amount sufficient to satisfy the judgment, except in the amount of \$72, and the execution was duly returned.

Merritt v. Grover.

That on the second day after said sale, another execution was issued on said judgment, and the same levied on the property of said Thomas, which was sold and \$30 realized.

That no return of this execution has been made, nor has the money, or any part thereof, received from the sale of said property been credited on the judgment.

That in November, 1879, the court set aside the sale of the real estate, and immediately thereafter another execution was issued upon the judgment of foreclosure for the full amount of said judgment and the further sum of \$128.88.

That no abandonment of the levy on the real estate, under the first execution, was ever made. Notwithstanding which fact, a levy on the real estate was made under said last execution and the same sold to the defendant. Wherefore plaintiffs insist that the last named sale is void and they ask the same to be set aside and the sheriff enjoined from executing a deed to the purchaser.

There was a demurrer to the petition on the ground the facts stated did not entitle the plaintiffs to the relief demanded. It was sustained and plaintiffs appeal.

Potter & Ronayne, for appellants.

Powers & Kenyon, for appellee.

SEEVERS, J.—I. The statute provides “but one execution shall be in existence at the same time.” Code, § 3025. It is insisted the last execution and sale thereunder should be set aside, because there was outstanding a previous execution, which had not been returned. In support of this proposition, in addition to the statute, *Ledyard v. Buckell et al.*, 5 Hill, 571; *Dorland v. Dorland et al.*, 5 Cow., 417, are cited. These cases were determined on motions to set aside the executions, as having been irregularly issued, and we incline to think there may be a difference where the execution is attacked before a sale, and

1. EXECUTION:
existence of:
issuing sec-
ond execu-
tion.

where an action in equity is brought afterward to set the sale aside. If, however, the case is brought within the statute, other authority is not required.

That an execution had been issued, and a sum of money realized by a sale of property before the return day of the execution, which has not been credited on the judgment, is admitted by the demurrer. It is, however, said by counsel for the appellee the statute only applies where the first execution was in existence at the time the second issued, and that an execution is not in existence when the return day has passed. That to exist is "to live, to have life or animation." We incline to think this is so. But an execution has sufficient life to sustain a sale made after the return day, if the levy was made before. For some purposes then, an execution has an existence after the return day. If for any purpose, the statute applies. We, therefore, think an execution must be regarded as existing until it has been returned.

Under the statute it is not material whether a levy had been made under the outstanding execution or not, or, if made, whether the property had been sold or not. While one execution is in existence another cannot issue. This is the rule. There may be exceptions, however, to such rule. The execution may have been lost or destroyed, but if so, a return of that fact could be made. But there may be cases where this could not be done. If so, we think it devolves on the plaintiff in execution, or the party claiming under the sale, if it is essential as to him to be shown, to allege and prove the facts which it is claimed avoid the statute.

II. Having reached the conclusion the execution under which the last sale of the real estate was made was irregular and issued without authority of law, it remains to be determined whether the sale should be set aside. Whether the sale should be set aside if a stranger to the execution had been the purchaser, we have no occasion to determine, because in the case before us the pur-

2. —: Judg-
ment credi-
tor: purchase
by.

Merritt v. Grover.

chaser is the plaintiff in execution. While it has been held that as to outstanding equities a judgment creditor, when he becomes a purchaser under execution, is protected to the same extent as a stranger, *Butterfield v. Walsh*, 21 Iowa, 97, it has also been held that such creditor is charged with notice that an appeal had been taken, and therefore he cannot be a *bona fide* purchaser, and not affected by the reversal of the judgment. *Twoood v. Franklin*, 27 Iowa, 239. The same principle should apply here because both executions issued at the instance of the judgment creditor, and it was his duty to see the first was returned before the second issued. He was, therefore, bound to know the second execution could lawfully issue, and as to him, we think the court erred in sustaining the demurrer.

III. The sale of the real estate under the first execution was set aside, but the levy was not. It would seem, therefore, an execution could properly issue, as provided in Code, § 3086, and the property so levied on disposed of. But it is said the section aforesaid only applies where there is no sale for want of bidders. We are not informed why the sale was set aside, but it must have been because it was illegal. If so, there was no sale, and consequently no bidders; or if there were no bids made, which the law will recognize, it can and should be said there was no sale for want of bidders, and, therefore, the last execution under which the real estate was sold was irregular. *Downard v. Crenshaw*, 49 Iowa, 296. As the same property was levied on under the last execution as had been levied on under the first, we do not determine whether the last sale should be set aside or not for this reason.

IV. We are at a loss to know why the execution was issued for \$428.88 more than was called for or due on the judgment. That the execution for this reason should be quashed on motion, we are inclined to think, but whether the sale should be set aside for this reason, we do not determine, because un-

 Long v. Long.

necessary. See, however, Rorer on Judicial Sales, section 732.

REVERSED.

57	497
108	582

LONG v. LONG.

1. **Judges of Election: REFUSING VOTE: MISTAKE OF LAW.** In an action against the judges of election for refusing, at a general election, to receive and deposit plaintiff's vote, the defendants may plead and prove an honest mistake of law, in mitigation of damages.
2. —: —: **RELEASE OF JOINT TORT-FEASOR.** The release of one joint tort feasor is the release of all. *Held*, that this defense was sufficiently presented by the answer in this case, and that the verdict, based upon such release, was supported by the evidence.

Appeal from Delaware Circuit Court.

SATURDAY, DECEMBER 17.

THE defendant was one of the judges of election of the Delaware Center voting precinct, at the general election in November, 1880. The plaintiff offered to vote at said election. His vote was challenged by a bystander, and his ballot was refused. He brought this action against the defendant, and also against one Peet, another of said judges, claiming that he was a legal voter of said precinct; that upon being challenged, he requested the said judges to administer to him the oath required by law to be administered to persons whose votes are challenged, and that said judges, "without the fear of God before their eyes," did willfully and maliciously refuse to administer the oath and refused to receive and deposit plaintiff's ballot in the ballot box, to his damage in the sum of \$1,000, for which he asked judgment. Afterwards the action was dismissed as to said Peet.

The defendant answered by admitting he was judge of the election, and that plaintiff presented himself at the polls and offered to vote; that he was challenged, and his ballot was re-

Long v. Long.

refused. But he denied that plaintiff requested him to administer the oath required in such cases, and that he was informed and believed the plaintiff had received from the other judges of election full satisfaction and compensation for all damages done him, by the said judges of election.

He further averred, in mitigation of damages, that he offered to administer to the plaintiff an oath furnished him by the county auditor, as the oath prescribed by law to be tendered to parties challenged; that he believed that to be the oath prescribed by law, and acted without intent to injure plaintiff in refusing to administer any other oath than that given by the county auditor.

There was a trial by jury, a verdict and judgment for defendant. Plaintiff appeals.

J. M. Brayton and I. N. Sullivan, for appellant.

Blair & Dunham, for appellee.

ROTHROCK, J.—I. The evidence tended to show that the plaintiff was a resident and voter of the election precinct.

That he presented his ballot and was challenged. That with the poll books sent out by the auditor there was a form of oath to be administered to persons challenged, by which they were required to testify that they had been resident of the township for ten days. This oath was tendered to the plaintiff and he refused to take it, and the attention of the judges was called to section 620, of the Code, which furnishes the form of oath and omits the ten days residence in the township or precinct. After consultation the judges determined to adhere to the printed instructions in the poll book, inasmuch as the Code was published in 1873, and the law might be changed, as indicated by the form prescribed by the auditor. These facts were practically undisputed.

The court instructed the jury as follows: "Under the

1. JUDGES OF
ELECTION:
refusing vote:
mistake of
law.

Long v. Long.

pleadings and undisputed facts shown by the testimony, the action of the defendant to this suit was contrary to law, and an invasion of the rights of the plaintiff as a voter, and the only questions for your consideration are: 1st. Whether there has been such an arrangement between plaintiff and the defendant Peet, as in law, operates as a discharge as to defendant Long, and if not, then to what extent plaintiff is entitled to damages."

Other instructions were given to the effect that the wrong done was a joint tort, and that if plaintiff made a settlement with Peet for the damages complained of, and for a valuable consideration released him from all further liability, then the defendant Long was also released.

Another instruction was given as to the measure of damages in case there had been no release, in which the court told the jury that if the defendant acted without malice, the plaintiff was only entitled to nominal damages, but that if his act was willful, additional and exemplary damages should be given.

The plaintiff asked the court to instruct the jury to the effect that the defendant could not plead or show ignorance of the law as a just cause or excuse. The instruction was refused and the refusal is assigned as error.

We think the ruling was correct. The court instructed the jury that there must be a verdict for the plaintiff in some amount, unless there was a discharge by reason of the alleged settlement. The amount of the verdict depended largely upon the alleged malice of the defendant. He pleaded the mistake as to the law, merely in mitigation of damages. If he honestly believed that the form of oath furnished by the auditor was correct and acted in that belief, this would go far in mitigation of damages, and defendant had the undoubted right to plead and prove it.

II. It is next urged that the court erroneously refused to

Long v. Long.

instruct the jury that a promise by plaintiff not to sue Peet, 2. —; —; made subsequently to his agreement to dismiss the ^{release of} joint tort-_{feasor.} suit (if such agreement was made), would be without consideration and of no force, if made after the agreement to dismiss was concluded.

The refusal to give this instruction was correct, because all the facts as to a settlement with Peet and dismissal of the suit as to him, and the promise not to bring another suit against him, are shown by the evidence to be part of the same transaction.

III. Another objection was made to the instructions as to the discharge, by the settlement with Peet, upon the ground that they were unwarranted from the pleadings. The answer as it appears to us sufficiently presents that defense. It was presented and pleaded as a complete defense, and was not attacked by demurrer or motion.

IV. Under the instructions of the court the jury must have found that the plaintiff received full compensation from Peet for the joint-wrong done him. It is objected that the verdict is not supported by the evidence. We think it is. It appears that the plaintiff and Peet had an interview and that the latter paid one-half of the costs of the suit, under an agreement that the suit should be dismissed as to him and not again renewed. Peet also published a card acknowledging that he was wrong in refusing the vote, and that he was sorry for it. The point made that these were not concurrent acts is not well taken. The jury were warranted in finding that all these acts were but one transaction, and they were also warranted in finding that the amount paid by Peet was full compensation for the injury. The release of one joint tort-feasor is a release of all. *Turner v. Hitchcock*, 20 Iowa, 310. In the case of *Ellis v. Eason*, The Reporter, vol. 11, p. 70, relied on by appellant, the wrong done was a joint trespass, in cutting and carrying away a large number of saw-logs of the value of more than \$1,000. The

The State v. Lucas.

plaintiff settled with one of the wrong-doers for \$200, with the understanding that he (plaintiff) was to look to the other parties for compensation. It was held the agreement was no bar to an action for the balance of the damages.

In the case at bar the damages are not susceptible of estimation in money or of a division into parts. The most that can be fairly claimed under the evidence was that the defendant, if liable at all, was liable for a mere technical disregard of his duty as an officer, and under circumstances that no jury would be warranted in finding that he was actuated by malice.

We find no error in the record and are united in the opinion that the judgment should be

AFFIRMED.

THE STATE V. LUCAS.

1. **Criminal Law: SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.**

Evidence considered and held sufficient to justify the jury in finding that the defendant was present and accessory to the robbery.

2. —: EVIDENCE: PARTY NOT BOUND BY. The State, by introducing proof of certain testimony given by the defendant upon a former trial, is not bound thereby to admit that such testimony was true.

3. —: —: ACCESSORY. It is not necessary that the evidence of an unlawful combination to commit a crime, should be direct and positive. The defendant's connection with the transaction being shown, it is for the jury to determine from all the circumstances, whether he was there as an honest dupe or as a criminal accessory.

4. —: —: SENTENCE NOT EXCESSIVE. In view of the aggravated circumstances of this case, the sentence, imposing but little more than half the maximum punishment allowed by law, was not excessive.

Appeal from Allamakee District Court.

SATURDAY, DECEMBER 17.

The defendant was indicted jointly with Charles Wood and James White for a robbery from the person of R. G. Edwards,

57	501
94	706
57	501
126	500

The State v. Lucas.

perpetrated by assaulting and wounding him with deadly weapons. The defendant was tried, convicted, and sentenced to the penitentiary. He appeals. The case was before us on a former appeal. See 55 Iowa, 321.

L. Bullis, for appellant.

Smith McPherson, Attorney-general, for the State.

DAY, J.—I. It is insisted that the evidence is not sufficient to support the verdict. R. G. Edwards, in substance, testified that he was watchman for Hemmingway, Barclay & Co., who were running a steam saw mill, and had a safe in a little brick office not far from the mill. That about three o'clock on the morning of August 4, 1879, whilst he was out examining the logs and looking to see that all was right, two men, one armed with a club and the other with a revolver, assaulted him; that the one armed with a revolver, whom he supposed to be Lucas, the defendant, held the revolver to his face and ordered him to lie down, whilst the other, whom he identified as Wood, and who is referred to in the evidence as the Kid, hit him with a club about three feet long; that he reeled, and when he came to, Wood was on his breast and there was a noose around his feet, and the other man was standing back of him; that they said they didn't want to hurt him if he would only submit; that they were going for the safe; that one of them said to the other, "now let's go for the safe," and that, whilst the other man went for a sledge, Wood rifled his pockets, and took three dollars, all the money he had. The witness further testified that the man who went for a sledge came back and stood over him. "And he asked me if I had any money, and he asked if the Kid had taken it all, and I said he had, and he asked if three dollars was all, and I told him yes." The witness testifies that he can't positively identify the man who presented the revolver, though he is satisfied in his own mind

1. CRIMINAL
LAW: suffi-
ciency of evi-
dence to sus-
tain convic-
tion.

The State v. Lucas.

who it was. The witness had a lantern, the light of which he threw upon the men, but they had handkerchiefs tied around their faces. He testifies to certain appearances of the eyebrows and a peculiar shrugging of the shoulders, by which he thinks he recognizes the defendant. Upon the other hand, the witnesses for the defendant testify that the defendant has no peculiar habit of shrugging the shoulders. The whole testimony of the witness amounts simply to this, that the witness is satisfied in his own mind that defendant is one of the parties who assaulted him, although he cannot state positively that such is the fact. Positive certainty is scarcely ever attainable except as to mathematical truths. There is no rule of law which requires that a witness shall be positively certain of a fact. The liability to error and mistake is so great in all human operations, that a suspicion generally arises as to the honesty of a witness who will not admit the possibility of his being mistaken. We do not feel warranted in holding that the evidence was not sufficient to justify the jury in finding that the defendant was present at the transaction referred to by the witness.

II. It is claimed, however, that conceding the defendant to have been present at the time referred to by the witness, still the evidence does not connect the defendant with the robbery in question, but shows that it was perpetrated by Wood whilst the defendant was after the sledge, and that the only offense contemplated by the defendant was the robbery of the safe. From the fact, however, that the defendant returned and asked the witness if he had any money, and if the Kid had taken it all, and if three dollars was all, the jury might well find that the purpose of the defendant and Wood was not limited to the mere robbery of the safe, but that it included as well the obtaining of any money which the witness might have upon his person. We think that, under the doctrine announced by the court in its instructions, and under the doctrine announced by this court upon the former appeal, the

The State v. Lucas.

jury might well find that the defendant, if present at the time referred to, was accessory to the robbery of Edwards. The verdict is not opposed to the instructions, taking them all together and considering them, as must be done, as limiting and qualifying each other.

III. The State introduced proof of certain testimony which the defendant gave upon the former trial. Respecting this the defendant asked the following instructions:

2. — : evi-
dence : party
not bound
by. “When the State proves the admission of defendant, as evidence in its favor, it thereby introduces the same as credible and truthful, and the plaintiff in so introducing it is bound by it as truthful.”

The refusal to give this instruction is assigned as error. This instruction was properly refused. The testimony of a defendant, upon a former trial, may be of so unreasonable and contradictory a character as to furnish evidence of its own untruthfulness. The State, by proving that the defendant gave such testimony, is not bound to admit that it is true.

IV. The defendant assigns as error the giving of the following instructions:

“If you are satisfied beyond a reasonable doubt, after considering and comparing all the evidence in the case, that

3. — : — : Lucas and his associates went to Lansing with the
accessory. common purpose and design to commit any crime that the circumstances might give them an opportunity to commit, and that the intention of Lucas was to aid and abet his associates in anything they might do in the consummation of such design, either by rowing them to Lansing, or waiting in the boat there for them while they went ashore, or in aiding them afterwards to escape, if for the purpose of evading justice, whether done for a general compensation of \$25 or other sum, or with intent to share in the proceeds of any robbery his associates might commit, whether he left the boat or not, he is equally guilty with his associates of any robbery they, or either of them, committed.”

The State v. Lucas.

This instruction is in harmony with the law as announced by this court on the former appeal. It is claimed, however, that there is no evidence that the defendant and his associates combined for any purpose or for any crime. It is not necessary that the evidence of an unlawful combination to commit a crime, should be direct and positive. It may be extracted from the circumstances connected with the transaction. See *Miller v. Dayton, ante*, p. 428, and authorities there cited.

It was proved that the defendant testified upon the former trial that he was hired by the Kid and James White to row them down to Dubuque for \$25. That they had staid at New Albin the night before they came to Lansing, and that they came to Lansing about 12 o'clock or a little before, and that the boys went up town after something, and that during this time he was asleep while the boys were up town, and that the boys came in a great hurry in the morning and ordered him to row across the river, and White put himself in the bottom of the boat, and that he pulled them across to the Wisconsin shore and sunk the boat and went across the country to La Crosse.

It was further shown that he testified that the two men divided money in the boat, and that the satchel, containing burglar's tools, which was produced in court, looked like the satchel which they carried. The connection of the defendant with Wood and White was thus shown by his own admissions. Whether he was with them as an honest dupe, or as a criminal accessory, was for the jury to determine from all the circumstances of the case.

V. It is claimed that the sentence is excessive. Upon the former conviction the defendant was sentenced to twelve years imprisonment. He had served seven months and one day when he was released by a reversal of the case. Upon his second conviction he was sentenced to twelve years imprisonment, less seven months and one day. The maximum punishment for the offense charged in the indictment is imprisonment for twenty years. Although the amount taken is

4. —: —: imprisonment. He had served seven months and
sentence not
 excessive. one day when he was released by a reversal of the case.

Easton v. Strother & Conklin.

small, the circumstances are aggravated. In imposing but little more than half the maximum punishment authorized, we cannot say the court erred.

AFFIRMED.

EASTON V. STROTHER & CONKLIN ET AL.

1. Promissory Note: AGAINST PARTNERSHIP: PURCHASE BY PARTNER.

A partner cannot, by purchase, become the owner of an outstanding note against the partnership; and if, in an attempted compromise of a firm note by one partner, there was a mutual mistake as to the amount due, the payment was good only for the amount paid, and not as full satisfaction of the note.

2. ———: EVIDENCE: INDORSERS: SURRENDER OF SECURITY. Evidence considered; *held* insufficient to show a surrender by the indorsers, of certain security held by them, upon the belief of payment and discharge of the note.

Appeal from Howard Circuit Court.

SATURDAY, DECEMBER 17.

ACTION to recover an alleged balance upon a promissory note. The petition avers that the note was executed by the defendants, Strother & Conklin, to the defendants, Day Bros., and indorsed by them to the plaintiff; that it was made May 10, 1877; that it was drawn for \$1,400, and bears ten per cent interest. The petition admits a payment of \$1,475, as made December 20, 1878.

The defendants, Strother & Conklin, for answer, aver that the note was purchased December 20, 1878, by W. Strother, a member of their firm for \$1,475, and was delivered to him, and that he still owns the same.

They also aver in a separate count that the note is fully paid.

To the count in the answer alleging the purchase, the plaintiff demurred upon the ground that the count showed that Strother was purchasing his own debt, and on the further ground that he did not pay the amount due on the note. The

Easton v. Strother & Conklin.

court sustained the demurrer, and the defendants, Strother & Conklin, excepted.

The defendants, Day Bros., for answer, aver that when they took the note of Strother & Conklin they took full security from them; that Strother & Conklin had a settlement of the note with the plaintiff, and that the note was surrendered to them by the plaintiff; that upon being informed of the settlement, and surrender, they surrendered the security held by them.

There was a trial without a jury, and judgment was rendered for the plaintiff for the amount claimed, \$187.22. The defendants appeal.

H. T. Read, for appellants.

Brown & Wellington, for appellee.

ADAMS, CH. J.—I. The first question raised is as to the sufficiency of the count of Strother & Conklin's answer setting up a purchase of the note by Strother. It was Strother's duty to take up the note for the firm by payment or compromise as best he could. The amount paid by him became a charge in his favor against the firm. This was all that he was entitled to. He could not by purchase become the owner of a note against the firm. The rule contended for by the appellants would afford a direct temptation to partners to attempt to evade their duty in respect to the firm paper, and speculate therein by first depreciating it, and then buying it. The count of the answer, then, was not good as showing a purchase. We have had some doubt as to whether it should not have been held good as showing a compromise. It shows that Strother & Conklin were not able to pay their debts in full. The appellants contend that when the maker of a promissory note is insolvent, and compromises with the holder, and takes up his note, he thereby becomes discharged thereon, and that the creditor cannot be allowed to maintain that the discharge was invalid for

1. PROMISSO-
RY note:
against part-
nership: pur-
chase by
partner.

Easton v. Strother & Conklin.

want of consideration. But if we should concede that this is so, we should feel constrained to hold that the demurrer was properly sustained. The count demurred to does not expressly aver a compromise, but a transaction of an entirely different character, and one which involved very different results. It was the plaintiff's right to have the issues properly defined, and if the defendants relied upon showing a compromise, to have such issue directly tendered. The plaintiff's theory was that there was a mutual mistake as to the amount due upon the note, and that it was only by reason of such mistake, that so small an amount as \$1,475 was received and the note surrendered. If there was such mutual mistake, the attempted compromise was invalid. The case does not differ materially from a case where the maker of a note attempts to pay the same in full, but by mistake in computation, pays less than the full amount. Such payment is good only for the amount paid.

II. Upon the trial the evidence showed very clearly that the amount computed by the parties to be due upon the note was \$1,487.16. From that amount the plaintiff threw off \$12.16. The next day he discovered, as he claims, that they made a mistake of one year's interest, to-wit, \$140, and he so notified all the parties immediately. Evidence was introduced against the objection of the defendants tending to show such mistake. The objection was based upon the fact that the plaintiff did not allege such mistake in his petition.

But we think it was competent to show it as against the allegation of Strother & Conklin that the note had been fully paid, and as against the allegation of Day Bros. that the note had been settled.

III. The allegation of Day Bros. that they surrendered security to the amount of the note is not, we think, proven.

2. ——— : evidence: in-
dorsers: sur-
render of se-
curity. Day Bros., it appears, were owners of certain stock in an elevator. This stock they sold to Strother & Conklin, and for it the note in question was

Easton v. Strother & Conklin.

given. It was understood that the stock in question was to stand in the name of Day Bros. until the note should be paid. It does not appear that Day Bros. ever had any certificate in their possession. A certificate was made out, but it remained in the hands of the secretary of the company. There is no evidence that it was ever indorsed or otherwise assigned. There was introduced in evidence a stub of certificate No. 7 of stock of City Elevator Co. of Cresco. That indicated that a certificate for thirty-two shares had been issued to Day Bros. Upon the stub also appeared a written memorandum in these words: "Transferred to Strother & Conklin." There was evidence that this memorandum was made by the secretary of the company, and was made immediately after the settlement. This, so far as we can see, constitutes the sole evidence of transfer or surrender. It is true C. Day, one of the firm of Day Bros., testified that he knew that the note had been paid and surrendered, and that shortly after he delivered the stock. But he says himself that the stock was in the hands of the president or secretary of the company. By stock we understand him to mean the certificate of the stock, and he admits in effect that he did not indorse or assign the certificate. He says that he thinks he did not sign any paper other than a receipt acknowledging payment for the stock.

Neither the articles of incorporation nor the by-laws of the elevator company were introduced in evidence, and we are not shown by what method the stock was to be transferred. But transfers are usually made, we believe, where a certificate has been issued, by some indorsement or assignment of the certificate, and surrender thereof to the company, and issuance of a new certificate to the assignee. The certificate issued to Day Bros. appears to be still outstanding, unindorsed, and unassigned. While this is so, we do not see how the company could properly issue a certificate of the same stock to another person. Strother & Conklin then had obtained no legal title to the stock, nor could they set up any equitable

Sweet v. Wright & Spencer.

title as derived through any verbal understanding based upon the supposed payment for the stock, if the fact was that such payment, by reason of a mistake, had not been made.

In our opinion, there was no error in the rulings of the court.

AFFIRMED.

SWEET V. WRIGHT & SPENCER ET AL.

1. **Evidence: LEVY ON GOODS: RES GESTAE.** Where the question was whether the stock of goods, seized under an execution, was the property of the judgment debtor or a third party; whatever was said by the judgment debtor to a clerk when employed by him, as to whom he was employed for, was competent testimony as a part of the *res gestae*.
2. ———: **RECALL OF WITNESS: DISCRETION OF COURT.** It rests in the sound discretion of the court whether a witness shall be recalled for re-examination.
3. ———: **DECLARATIONS OF PARTY IN POSSESSION OF PROPERTY.** The declarations of a party in the possession of property merely explanatory of such possession are admissible in evidence; but where the declarations go further and detail the nature of the agreement under which possession is held, they are not admissible.
4. **Purchase of Stock of Goods: WHEN FRAUDULENT.** The purchase of a stock of goods from an insolvent, for a sufficient consideration, will be valid, unless it was done for the purpose of aiding the debtor to hinder, delay or defraud his creditors.
5. **Practice: BILL OF EXCEPTIONS: RULE OF COURT.** *Held*, that a certain rule of court, set out, did not require the bill of exceptions to be settled and filed within thirty days from the adjournment of court, but that the judge might have fifty days therefor.

Appeal from Marshall Circuit Court.

SATURDAY, DECEMBER 17.

THIS action is brought upon an indemnifying bond, executed by Wright & Spencer, as principals, and T. J. Fletcher, as surety, to procure a levy by the sheriff of an execution in favor of Wright & Spencer, and against W. Martin & Co.,

57	510
85	511
57	510
90	740
57	510
107	382

Sweet v. Wright & Spencer.

W. Martin and J. B. Sweet, Jr., upon certain goods, the property of J. B. Sweet, Jr. The plaintiff claims that the property levied upon belonged to him, and that the goods were taken from him and have not been returned, whereby he has sustained damage in the sum of one thousand dollars.

The defendants admit the execution of the bond and the levy, but deny that the property levied upon belonged to the plaintiff, and allege that it belonged to J. B. Sweet, Jr., one of the execution defendants, and that the alleged ownership of J. B. Sweet, Sr., was fraudulent, and assumed by the plaintiff, with fraudulent intent to hinder, delay and defraud the creditors of J. B. Sweet, Jr. There was a jury trial, resulting in a verdict and judgment for the defendants. The plaintiff appeals.

Brown & Binford, for the appellant.

P. M. Sutton, for the appellees.

DAY, J.—I. The question in controversy is, whether the stock of goods was the property of J. B. Sweet, Sr., or of J. B.

1. EVIDENCE: Sweet, Jr., against whom the writ of execution
levy on
goods: res
gestae. issued. The plaintiff introduced as a witness one

Daniel Barber, and asked the following question:

“What is your occupation, and what was it at that time?”

To this the witness answered: “I was at work in the store; I don’t recollect just when I commenced in the fall; I had been at work from the fall through; Mr. Sweet employed me—the young man.” The plaintiff then asked the following question: “What was it Mr. J. B. Sweet, Jr., said to you at the time you were employed, as to whom he employed you for?” The defendant objected to the question as immaterial and incompetent. The objection was sustained. The plaintiff excepted, and assigns the ruling as error. The witness, it is to be noticed, went beyond a proper answer to the interrogatory propounded, and in addition to stating what he was doing, he

Sweet v. Wright & Spencer.

stated who employed him. Now, if J. B. Sweet, Jr., at the time of the employment, stated to the witness that he employed him, not for himself, but for J. B. Sweet, Sr., this statement would constitute a part of the *res gestae*, and be, in every respect, competent and most material. In excluding this testimony it is clear to us that the court erred.

II. J. B. Sweet, Jr., a witness for the plaintiff, was introduced, examined, cross-examined, and permitted to retire, and other witnesses were examined. Afterward the defendant was permitted, against the objection of plaintiff, to recall J. B. Sweet, Jr., for further cross-examination. This action the plaintiff assigns as error. It rests in the sound discretion of the court whether a witness shall be called back for re-examination. *Barker v. Bell*, 46 Ala., 216. Besides, in this case no material evidence was obtained upon the further cross-examination.

III. The defendant made an affidavit and motion for a continuance on the ground of the absence of a witness, one H. L. Spencer. The plaintiff admitted that the witness would, if present, testify to the facts stated in the affidavit, and the motion for continuance was thereupon overruled. Against the objection of the plaintiff, the defendant was permitted to read from the affidavit for continuance as follows: "That said J. B. Sweet, Jr., told said H. L. Spencer that the old man, meaning his father, J. B. Sweet, Sr., was simply giving him the use of his name, and that everybody knew that his father was good, and if the business was run in his father's name no one would doubt his ability to pay. That the business was his, and was only run in his father's name for protection." The admission of this evidence is assigned as error. It has been held by this court that declarations of a party in possession of property, explanatory of the possession, and claiming title in himself, are competent. *Ross v. Hayne*, 3 G. Gr., 211; *Taylor v. Lusk*, 9 Iowa, 444; *Blake v. Graves*, 18 Iowa, 312; *Stephens v. Wil-*

2. — : recall
of witness:
discretion of
court.

3. — : dec-
larations of
party in pos-
session of
property.

liams, 46 Iowa, 540. See, also, *Roebke v. Andrews*, 26 Wis., 311. The dissenting opinion of Dixon, C. J., in the case last cited, shows that there is much conflict upon the question, and this court has said in *Stephens v. Williams*, *supra*, that were the question *res integra*, we might feel inclined to hold declarations in favor of the title of one in possession inadmissible. In *Taylor v. Lusk*, 9 Iowa, 446, it is said that the cases all agree in holding that the declaration must be made at the time of the possession, must be simply explanatory of it, and not in regard to the contract under which the possession is held. This was expressly ruled in *Thompson v. Mawhinney*, 17 Ala., 362, and in *Mims v. Sturdevant*, 23 Ala., 664. The declaration admitted in this case is not simply that J. B. Sweet said he was holding the property in his own right, but it goes further and details the nature of the agreement between him and his father, under which he held the property. The declaration is not merely a part of the *res gestae*, but is a narrative of a past occurrence. Under the authorities above referred to it is inadmissible.

IV. The plaintiff asked the court to instruct the jury as follows: "If you find J. B. Sweet, Jr., was indebted to his father, the plaintiff, and the plaintiff had indorsed or signed notes amounting to \$800, and over, and the son applied for further aid, and the father bought the goods, and paid him \$1,000 additional, this would be a good sale. Even if the son was in debt the plaintiff had a right to purchase the goods to secure himself. If plaintiff actually paid one thousand dollars, and assumed to pay the W. Martin notes, and released indebtedness against his son, the sale would be valid, even if J. B. Sweet, Jr., was in failing circumstances, and the plaintiff knew it."

4. PURCHASE
of stock of
goods: when
fraudulent.

The court gave this instruction with the following modification: "That the sale would be valid unless the plaintiff accepted of the bill for the purpose of hindering the creditors of Sweet, Jr., in collecting their claim. If accepted for that

Sweet v. Wright & Spencer.

purpose it was invalid, though it also secured to the plaintiff \$800 debt, and he paid \$1,000 in addition." The plaintiff complains of the modification of the instruction. In our opinion the modification is correct. It is a familiar principle that a purchase of property for the purpose of aiding a debtor to hinder, delay or defraud his creditors, is invalid, notwithstanding the fact that a sufficient consideration is paid.

The plaintiff complains of the entire charge of the court, but does not distinctly point out any objections which are of sufficient importance to authorize a reversal.

V. The appellee submitted with the case a motion to strike out of appellant's abstract all the purported evidence and to affirm the case upon the grounds that the evidence was not preserved by any bill of exceptions, and that the rules of court require bills of exceptions to be signed within thirty days from the adjournment of the court, and the certificate of the judge to the evidence was not obtained till after that time.

1. No transcript has been filed, and hence we have not been furnished any means of determining the first ground of the motion.

2. It is shown by a certified copy of the records of the court that it adjourned on the 6th day of November. The abstract shows that the judge certified to the evidence on the 10th day of December. A rule of the court provides that "bills of exceptions may be settled after the adjournment of the term, unless objection be made and entered of record in term, and without such objection the parties will be presumed conclusively to consent thereto. Within thirty days after the adjournment, the party excepting shall prepare his bill and serve a copy thereof upon the attorney of the opposite party, who shall be deemed to consent to the correctness of the same, unless within ten days thereafter he shall serve amendments upon the attorney from whom he received a copy of the bill, and within ten days thereafter such bill of exceptions shall be settled by the

5. PRACTICE:
bill of excep-
tions: rule of
court.

Warder, Mitchell & Co. v. Pattee Bros. & Co.

judge, unless a different manner be agreed to in writing." This rule does not require the bill of exceptions to be settled within thirty days from the adjournment of the court.

Upon the contrary the judge *may* have fifty days from the adjournment of the term within which to settle the bill. The motion must be overruled. For the errors considered the judgment is

REVERSED.

WARDER, MITCHELL & CO. v. PATTEE BROS. & CO.

1. **Promissory Note: EXECUTED BY AGENT: EVIDENCE.** Where an agent executed a note in the name of his principals, by himself as agent, for the purchase of property to be used in the business of his agency, and the evidence leads to the conclusion that the principals either consented to the purchase, or assented to it afterwards, they will be liable on the note.

Appeal from Jackson District Court.

SATURDAY, DECEMBER 17.

ACTION upon a promissory note purporting to be executed to Davis & Collins by the defendants, Pattee Brothers & Co., by E. C. Bickford, agent, and indorsed by Davis & Collins to the plaintiffs. The defendants for answer denied that Bickford had authority to use their name in the execution of the note. The plaintiffs then filed an amendment to their petition in which they averred that D. & C. sold to the defendants a team of horses, wagon and harness for the amount for which the note was given, and that the plaintiffs have become the equitable owners of the account for said property. They also stated that they were uncertain as to whether they could prove the authority of Bickford to execute the note, but that they sought to recover only the amount thereof, whether the same be recoverable upon the note or account. The defendants denied the

Warder, Mitchell & Co. v. Pattee Bros. & Co.

allegations of the amendment. The court by consent of parties made an order that the cause be tried as an equitable one. It was accordingly so tried, and judgment was rendered for the plaintiffs. The defendants appeal.

S. D. Lyman and A. R. Cotton, for appellants.

S. S. Simpson and L. A. Ellis, for appellees.

ADAMS, CH. J.—The defendants' firm is composed of H. H. Pattee, J. H. Pattee and J. C. Pillsbury, and is engaged in manufacturing cultivators at Monmouth, Ill. In their business they employed Bickford as a traveling agent. Soon after his employment he purchased in the name of his employers the team of horses, wagon and harness of Davis & Collins, and used the same in his business. The note in question was given for the purchase money.

1. PROMIS-
SORY note:
executed by
agent: evi-
dence.

We do not think that there was anything in the nature of Bickford's employment which implies authority to purchase the property. As to whether the authority was expressly given the evidence is conflicting and leaves our minds in some doubt. Bickford testifies that the authority was expressly given him by a letter now lost, and that the letter was shown to Davis & Collins at the time when the purchase from them was made. M. Collins, of the firm of Davis & Collins, testifies that such letter was shown him and read by him. For the purpose of rebutting this evidence the testimony of two of the defendants was taken and they both deny that they wrote such letter, and deny that such letter was written by any member of the firm. They also testify that after the execution of the note they received a telegram from Davis & Collins inquiring if Bickford was authorized to purchase a team; and they ask us to infer that it was not true that Davis & Collins had been shown a letter giving such authority, as that would have obviated the necessity of inquiring by telegraph.

One of the Pattees also testifies that after this action was commenced Collins admitted to him that he read no letter giving the authority in question. But Collins positively denies making such admission, and it cannot be considered as proven that he did. The sending of the telegram would indicate that Davis & Collins did not feel satisfied by the evidence which they had of Bickford's authority, but this might have been because they were not certain of the genuineness of the letter, or because they did not retain such letter in their possession. While the Pattees testified that no member of their firm wrote such letter, it is evident they did not positively know this, and that it might have been written by Pillsbury. There was circumstantial evidence, it is true, tending to show that it was not written by him. But we should hardly be justified in believing that any witness committed perjury if the testimony can be reconciled by any rational explanation.

Bickford testified that after he purchased the team and used it for a while, the defendants wrote him that they wished he would sell it, and expressed a hope that they would not lose anything. Both the Pattees deny writing any such letter, but it might have been written by Pillsbury.

As impairing to some slight extent, at least, the credibility of the Pattees, we may mention the unqualified way in which they saw fit to testify to what they could not, in the nature of things, positively have known.

Again, one of the Pattees testifies that they paid Bickford for the use of the team at the time of Bickford's final settlement. On cross-examination he shows that Bickford was owing them at that time, and it was made abundantly evident that no money passed to Bickford for the purpose of making such payment, and it is not certain indeed that anything was actually credited him in account.

In view then of the evidence, taken together, we have reached the conclusion that the defendants either consented to the purchase beforehand or assented to it afterwards.

Warder, Mitchell & Co. v. Pattee Bros. & Co.

Whether it would follow from the mere authority to purchase that Bickford had the authority to give the defendants' note, we do not determine. There is some evidence that the defendants regarded themselves in need of a team to be used by Bickford, and that they did not feel able to pay for the same in cash. There is also some evidence that after the defendants had been informed of the existence of the note they recognized their liability upon it. Bickford testifies that J. H. Pattee met him at Cedar Rapids and asked him if he would be ready to pay the note *without the defendants looking after it*. This, it is true, would seem to indicate that Pattee regarded Bickford as under obligation to pay it, but it was a clear recognition, we think, of the defendants' liability. Bickford might have obligated himself to the defendants to pay it by reason of his indebtedness to them, on final settlement, or by reason of some deal not disclosed in the evidence.

We ought to say that Pattee denies saying to Bickford at Cedar Rapids what Bickford says he did, and testifies to saying something very different. But what he testifies to is inconsistent with the conclusion we have reached in regard to authority to make the purchase, and we have to say that the testimony of Bickford appears the more credible.

We are of the opinion then that the defendants were liable upon the note.

Having reached this conclusion we need not consider the question raised by defendants as to the right of the plaintiffs to recover upon the account.

AFFIRMED.

Latham v. Myers.

LATHAM ET AL. V. MYERS.

57	519
80	287
57	519
105	573
57	519
120	217
57	519
127	669
127	670
57	519
134	170

1. **Guardian and Ward: ALLOWANCE FOR SUPPORT.** Where a guardian, who was also the step-father of his wards, and provided for them and received their services, the same as though they were his own children, had from time to time been allowed certain sums by the probate court for their support, the decree of the court below allowing him such expenditures, upon the final accounting, was approved.
2. ———: **CHANCERY: JURISDICTION.** The Circuit Court, sitting as a court of chancery, has jurisdiction to adjudicate all matters in controversy between the guardian and his wards, whether arising after or before the wards became of age.
3. ———: **JUDGMENT: INCOME OF ESTATE.** Where the evidence showed that the judgment in favor of the guardian, for the support of his wards, could be satisfied out of the income of their estate, it was held proper under the pleadings.

Appeal from Boone Circuit Court.

MONDAY, DECEMBER 19.

IN chancery. There was a decree rendered in the Circuit Court granting relief to defendant. Plaintiffs appeal.

Ramsey & Jordan, for appellants.

I. J. Mitchell and *Hull & Whitaker*, for appellee.

BECK, J.—I. The defendant was the guardian of the plaintiffs. After they became of age they caused a citation to be issued requiring defendant to make a report to the Circuit Court of his transactions as guardian. The case was by the Circuit Court sent to a referee, who reported the money received and paid out by the guardian. The defendant claimed compensation for his services and for the support of the wards, who, as the referee found, were taken into the family of the guardian and there maintained as his own children, he receiving their services until they became of age. The referee, in his report, submitted to the court the questions involving the defendant's right to the compensation so claimed by him, as well as the sufficiency and effect of the reports made by the

Latham v. Myers.

guardian to the Probate Court, from time to time, and the approval thereof. Upon the filing of this report it was approved so far as the accounts of the guardian were stated, and it was ordered that he have permission to file a petition setting up his claims for compensation not allowed in the report of the referee. The order fixed the time of filing the petition and the answers thereto by plaintiffs. The defendant filed a petition under the order, and the plaintiffs filed answer thereto, and two of them set up a cross-claim against defendant for services rendered by each of them. Upon the issues thus formed the case was tried, as an action in chancery, upon written testimony, and was remanded to the same referee for a new statement of the accounts of the parties. Upon the coming in of the second report of the referee, a decree was entered in favor of defendant, and separate judgments were rendered against each of plaintiffs for the amounts found due from each respectively.

The cause seems to have been regarded as an action in chancery, after the petition of defendant and cross-petition of plaintiffs were filed, setting up their respective claims. It is so regarded by both parties in this court, who unite in claiming that it is triable *de novo* here.

We do not understand that the amount of the various items in the respective accounts are disputed, the questions in the case involving the correctness of the decision of the court in allowing certain matters charged in defendant's account. No other questions are discussed by counsel. The testimony, as presented to us in the abstract, we think, sufficiently established the various matters allowed by the court. We are required to determine whether the plaintiffs are chargeable with some of these items.

II. We will proceed to notice questions raised by appellants in their printed argument. Defendant was allowed by the decree of the Circuit Court certain sums for the support of his wards, the plaintiffs. It is shown that after he was appointed their guardian,

1. GUARDIAN
and ward :
allowance for
support.

Latham v. Myers.

he married their mother and took them with her into his own family, where they were provided for as his own children. They were regarded as members of his family and rendered to him such services as children generally render to their parents. Prior to the commencement of this proceeding, defendant had, at different times, made reports to the Probate Court, and claimed and was allowed certain sums by the court for the support of his wards. It is not claimed that the amounts allowed were excessive, or the orders were procured by fraud or by concealment of the facts of the case. While it is true that one standing in *loco parentis* is liable for the support of a child, and if he be a guardian, would not, in ordinary cases, be entitled to compensation for the ward's maintenance, there are exceptions to the rule. The condition of the parent and the extent of the ward's estate, in some instances, would authorize the court to allow the parent out of the child's estate for expenses incurred in his support.

The orders by the Probate Court allowing the defendant his charges for the support of his wards, are to be regarded as binding upon plaintiffs, so far at least as to establish *prima facie* the right of the defendant to have credit for the items allowed. As it is not shown that the allowances are not just and proper, there is no ground for denying to defendant credit therefore. The court below correctly allowed defendant for expenditures made under these orders.

III. The record of one of the orders seems to have been imperfect or wanting. There is evidence showing that when the report of the guardian was made asking for the order, it was allowed. Even if the record of the order be imperfect or wanting, we think the defendant ought now to be credited with the sum then allowed. The defendant ought not to be subjected to the hardship which would result from refusing him credit for the expenditure approved by the court, for the reason that, through no fault on his part, a record of the court's order was not made.

Latham v. Myers.

IV. It is insisted that the Circuit Court had no jurisdiction to enter judgment against the plaintiffs, and to adjudicate upon transactions between them and their guardian, arising after they became of age. It may be conceded that if the case is to be now regarded as a proceeding in the court of probate the position of the plaintiffs would be correct. But the parties, after the petition of defendant was filed in the court below, regarded the case as pending in chancery. It was tried as such in that court, and is presented to us as a chancery cause, triable anew in this court. We must regard it as an equitable action. There can be no doubt of the jurisdiction of the Circuit Court, sitting in chancery, to enter the judgment complained of in this case, and to adjudicate all matters in controversy between plaintiffs and defendant, whether they arose before or after the plaintiffs became of age.

V. The plaintiffs insist that the judgments are not in accord with the relief prayed for by defendant in his petition, which expressly disclaims asking for an "allowance" which would require an appropriation for its payment out of the principal of the estate, or which could not be paid out of the income of the estate. We think the evidence shows that the judgments in favor of defendant may be satisfied out of the income of the estate, that is, the income plaintiffs have received from the estate is greater than the total amount of the several judgments.

It is our opinion that the judgment of the Circuit Court ought to be

AFFIRMED.

Crispin v. Winkleman.

CRISPIN V. WINKLEMAN.

1. **Testamentary Disposition: MUST BE IN WRITING: RULE APPLIED.**

Where the defendant without being appointed administrator, took and held possession of the decedent's property under a claim that by a parol agreement, entered into between himself and decedent, he became a trustee of the property, the rule that if the intended disposition of property be of a testamentary character, such disposition is inoperative, unless, declared in writing, in strict conformity with the statutes regulating devises and bequests, approved and applied to the facts of the case.

2. **Estates of Decedents: INTERMEDLER: PAYING CLAIMS.** One who intermedles with the estate of a decedent, without having been appointed administrator, has no right to pay claims out of the assets of the estate; and in no case can he escape liability for so using the money of the estate, without an affirmative showing that the amounts paid were correct.3. —: —: **CLAIMS AGAINST ESTATE.** An intermedler's claim for nursing decedent and for the care of his child, should have been established as a claim against the estate. He had no right to reimburse himself therefor out of the proceeds of decedent's property in his hands.4. —: **ITEMS OF ACCOUNT: NOT ESTABLISHED.** An item of account for clothing furnished to the decedent's child prior to his death, not established nor shown to have been paid out of the decedent's money and by his direction, must be disallowed.5. —: **EVIDENCE: PREPONDERANCE OF: TRIAL DE NOVO.** The evidence being conflicting, and the case not triable *de novo*, the judgment will not be reversed upon the ground that it is not supported by the preponderance of the testimony.*Appeal from Mahaska Circuit Court.*

MONDAY, DECEMBER 19.

THE plaintiff, as administratrix of the estate of John Winkleman, Jr., deceased, brings this action to recover of the defendant the value of certain personal property, of which it is alleged that the decedent died seized, and which it is alleged that the defendant has wrongfully taken and holds, under a claim of right.

The defendant admits that he claims the right to hold the property and avers that he has such right by reason of a nun-

57	523
80	755
57	523
109	514
57	523
129	199

Crispin v. Wickleman.

cupative will, and also by a parol agreement, entered into between him and the decedent, whereby he became a trustee of the property. The defendant also pleaded that he had expended and disposed of the property in the execution of his trust.

There was a trial without a jury and judgment was rendered for the plaintiff. The defendant appeals.

Crookham & Gleason, for appellant.

Lafferty & Johnson, for appellee.

ADAMS, CH. J.—I. No will was probated and the allegations of the answer in regard to it were stricken out. The defendant relies upon an agreement whereby, as he alleges, he was made trustee of the property.

The decedent died seized of a small property, and owed a few debts. The defendant, his father, took care of him in his last sickness, which appears to have been a protracted one, and undertook to transact for him such little business as he had to do. The decedent appears to have had full confidence in his father, and he put all, or nearly all, his property into his hands. The understanding between them was that the defendant should use so much of the property as was necessary in paying the debts of the decedent, the expenses of his last sickness, and his funeral expenses, and the balance, if any, he should use in the support of the decedent's children. With this understanding the defendant took possession of the property and undertook to carry out the wishes of his son, and in all that he did appears to have acted in good faith.

The plaintiff, however, contends that the agreement relied upon was of no force, so far as it was designed to be operative after the death of the decedent, and gave the defendant no right to, or interest in, the property against her who has been duly appointed administratrix. This position of the plaintiff,

1. TESTAMEN-
TARY dispo-
sition: must
be in writ-
ing: rule
applied.

Crispin v. Winkleman.

we have to say, we think is well taken. It is plain to be seen that it was the decedent's intention that his father should virtually administer upon his estate without taking out letters of administration. But such an agreement could not be recognized by us without giving it testamentary force, which we are not allowed to do. In *Perry on Trusts*, section 92, the author says: "We may safely assume as an established rule that if the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, such disposition is inoperative, unless it be declared in writing, in strict conformity with the statutory enactments regulating devises and bequests." This statement appears to be correct.

It was competent of course for the decedent to appoint his father his agent to transact his business. Whatever money of the decedent, therefore, the defendant properly expended for him during his life, the defendant cannot properly be called upon to pay to the plaintiff. The agreement was good enough so far as it was executed by the defendant during his agency, but there is no rule of law better settled than that an agency terminates upon the death of the principal. Upon the termination of the defendant's agency he became a mere custodian of the property remaining in his hands, and had no right as against a duly appointed administrator.

The defendant seems to have supposed that the case must turn upon the question as to whether a trust in personal property can be created by parol. He has cited several authorities to show that it can. The doctrine contended for is unquestionably correct. But it does not go far enough to aid the defendant in this case. Whatever trust was created the decedent in his lifetime could have enforced. So if he had given the property to his children in such way that the title passed in his life time, and the defendant had been constituted trustee of the property for his children, such trusteeship would not have been terminated by the death of the decedent, and in an action by the children to enforce the trust the defendant could not

Crispin v. Winkleman.

have successfully denied and defeated the trust, on the ground that the evidence of it was not in writing. But the defendant does not claim that the title to the property passed to the children, except as heirs. Prior to the decedent's death the defendant, upon his own theory, was trustee of the property for the decedent. His trusteeship for the heirs commenced, if it commenced at all, with their inheritance. But to hold that it commenced then would be giving testamentary force to the agreement, which, as we have seen, is not allowable.

II. The money paid out by the defendant for funeral expenses was allowed to him, and in regard to that there is no controversy. But the defendant paid two bills for medical services rendered the decedent, and these payments were not allowed. The defendant in his argument complains of the action of the court in this respect.

In our opinion there are two grounds upon either of which the ruling can be sustained. It was not the defendant's right to use the money of the estate in paying its debts. *Portman v. Klemish*, 54 Iowa, 198. It is true that in that case the defendant was not charged with money so used; but the court expressly disapproved the acts of the defendant, and sustained the ruling of the court below, only by reason of the peculiar circumstances of the case. The decedent's widow had been made sole devisee and appointed executrix. For some reason she failed to qualify. The defendant undertook to assist her in the management and disposition of the estate. The payments were made with that view. The duly appointed administrator received money enough to pay all the proven debts. If a recovery had been allowed from the defendant it would have been solely for the benefit of the devisee, who did not appear to be in a condition to complain. While the result was favorable to the defendant in that case, the general doctrine of the opinion is against the defendant in this.

Besides in no case could an intermeddler be allowed to escape liability for using money of the estate in the payment of its

Crispin v. Winkleman.

debts, without an affirmative showing that the amounts paid were correct. In this case we find no evidence of the value of the services paid for, but merely of the amounts paid.

III. The defendant claims that he should have been allowed for personal care bestowed by him upon the decedent during a. — : — : his sickness, and also for supporting the decedents' claims against estate. child.

The court below seems to have regarded the defendant's claim in this respect as a counter-claim. As such it was clearly not allowable. But the claim was evidently made by way of defense merely, and as showing that the defendant ought not to be held to pay the plaintiff for property which he had disposed of under the agreement, and in accordance with its terms. The answer, as we understand it, proceeds upon the theory that the defendant's claim for nursing, etc., has really been discharged, and he sets it up now merely as a mode of accounting for the property which came into his hands, and for which he would otherwise be chargeable.

If the amount due the defendant had been liquidated between him and the decedent, and the property which had come into his hands had been wholly money, there would be much ground for holding that the defendant's position is well taken. We might hold that the understanding was that the money was applied. But we cannot hold that it was competent for the defendant to liquidate his own claim and pay himself, out of such property as he had. Whatever then became due him for nursing, etc., was, we think, a subsisting claim against the decedent's estate, and should have been proven by the defendant, and established against the estate in the mode which the statute provides.

IV. In the defendant's account there is an item of \$11, which is said to be money paid for clothing for decedent's child prior to decedent's death. If the defendant paid the amount for that object from the decedent's money and under his direction, the defendant

4. — : — :
Items of account not established.

Crispin v. Winkleman.

could not properly be now charged with the same money. But the item was not proven, nor do we discover that any evidence was offered and excluded by which it might have been proven. The defendant, to be sure, claims that there was. A question was asked him, as a witness, in these words: "Did you board and clothe the child of the decedent before the death of the decedent; if so, how long, and how much was it worth?" This question was disallowed and the defendant assigns error upon the ruling, but we think that it was properly disallowed. It was not designed, we think, to show that the defendant paid out the decedent's money, but to show how much became due the defendant for the board and clothing furnished.

V. The defendant claims that the judgment, in any event, is too large. The evidence, however, is conflicting, and it is not claimed that the judgment is wholly without support. But it is said that the case is triable *de novo* and that according to the preponderance of the evidence the judgment should have been less.

But the action was brought as a law action; the evidence was preserved by a bill of exceptions; we find no certificate that the evidence made of record was all the evidence offered, and the appellee states, in amended abstract, that there was none. The case is presented here upon an assignment of errors, so the action appears to have been tried as a law action and to be presented here as such. It is certainly then not triable here as an equitable action, and is not triable *de novo*.

The defendant claims that the evidence shows conclusively that a part of the property with which he has been charged is not in his possession, but in the possession of one Anistatia Winkleman. But the evidence shows that the property came into her possession by the defendant's direction, and the defendant's answer shows that he claims the right to the property as against the plaintiff.

In our opinion the judgment must be

AFFIRMED.

WILKINS V. THE GERMANIA FIRE INSURANCE CO. ET AL.

57	529
112	20

1. **Insurance: WARRANTY: BREACH OF: BURDEN OF PROOF.** Where the warranty contained in an application for fire insurance was, that the statements were "just, full and true, *so far as the same are known to the applicant,*" the absolute truth of the facts stated was not warranted; and the burden was upon the company to prove a breach of the warranty.
2. ———: **DESCRIPTION OF BUILDING.** Where the building insured was described as "two stories high," and the main part was two stories high, but a small, rear addition, was only one story high, such inaccuracy of description would not constitute a breach of the warranty.
3. ———: **EVIDENCE OF VALUE: VERDICT.** The evidence of the value of the building considered, and held sufficient to sustain the verdict.
4. ———: **PROOFS OF LOSS: MOTION TO DISMISS: PRACTICE.** The objection that the proofs of loss were not made in time is not reviewable under the circumstances of this case. Where a party demurs to the evidence, or moves to dismiss for insufficiency of the evidence, he must be deemed to have waived his exception to the admissibility of the evidence, and on an appeal from the ruling, upon the motion to dismiss, this court can only review the correctness of that ruling.

Appeal from Guthrie District Court.

MONDAY, DECEMBER 19.

ACTION upon a policy of fire insurance, executed to the plaintiff by the defendants, the Germania Fire Insurance Co. and the Hanover Fire Insurance Co. The defendants for answer set up certain alleged breaches of warranty, and also a failure to serve proof of loss. After the plaintiff had introduced evidence on his part and rested, the defendants demurred to the evidence and moved to take the case from the jury, and to dismiss it for want of any evidence upon which a recovery could be based. The court overruled the motion and rendered judgment for the plaintiff. The defendants appeal.

Piatt & Carr, for appellants.

Wolf & Landt, for appellee.

Wilkins v. The Germania Fire Insurance Company.

ADAMS, CH. J.—I. The policy was issued upon a written application, and the insured covenanted that the statements contained in the application were “a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant.” It was also provided, both in the application and policy, that the statements of the application should be deemed warranties.

1. INSUR-
ANCE: WAR-
RANTY:
breach of:
burden of
proof.

In the application it was stated, among other things, that the exposures on the east, within one hundred and fifty feet, were two frame buildings. The answer avers that there were more than two frame buildings within one hundred and fifty feet on the east. The plaintiff for reply averred that the “said adjoining risks within one hundred and fifty feet, not mentioned in the application, were not directly or indirectly the cause of the loss nor tributary thereto, and the defendants were in no way prejudiced thereby.”

If there was a breach of warranty such fact is fatal to the plaintiff's recovery, and it is not proper to inquire whether the loss occurred by reason of the existence of facts which constituted the breach of warranty. We do not indeed understand the plaintiff as seriously insisting that it is. His position, as we understand, is that there is no evidence that there was a breach of warranty. To this the defendants reply that no evidence was necessary, because the plaintiff virtually admits in his reply that there were exposures within one hundred and fifty feet, not mentioned in the application, and they insist that if this is so there was necessarily a breach of warranty. It is to be observed, however, that the warranty in this case is somewhat peculiar. The warranty is that the application “is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property insured, *so far as the same are known to the applicant.*”

Wilkins v. The Germania Fire Insurance Company.

Our attention has been called by the defendants to several decisions holding that the ignorance of the insured of the untruth of the matters warranted is immaterial. This is undoubtedly correct where the truth of the matters stated is warranted absolutely. But we cannot deem the truth of the matters stated as warranted absolutely in this case, without completely eliminating from the warranty the words, *so far as the same are known to the applicants*, and giving them no force whatever. This we should not be justified in doing. *Garcelon v. Hampden Insurance Co.*, 50 Me., 580.

As to whether the plaintiff had knowledge that there were more exposures on the east within one hundred and fifty feet, than he stated in the application, there was no evidence one way or the other. This being so, the defendants contend that judgment should have been rendered in their favor, because all matters warranted are a part of the contract, and the burden is on the plaintiff to prove the truth of the matters warranted as a condition of recovery. It is not to be denied that it has been frequently so held. *Campbell v. New England Mutual Life Insurance Co.*, 98 Mass., 381; *McLoon v. Connecticut Mutual Life Insurance Co.*, 100 Mass., 472; *Jefferson Insurance Co. v. Cotteral*, 7 Wend., 72. This court assumed that to be the correct rule in *Miller v. Mutual Benefit Life Insurance Co.*, 31 Iowa, 216; but the precise question was not involved in the case. As holding a different rule see *Swick v. Home Life Insurance Co.*, 2 Dillon, 160, and *Holabird v. Atlantic Mutual Life Insurance Co.*, 2 Dillon, 166. For the purposes of this opinion, it may be conceded that the general rule is that the burden is upon the insured to prove the truth of the matters warranted as a condition of recovery. But there are some exceptions to the rule. Where the pleadings are so framed that the defendant assumes the burden of showing a breach of warranty, it has been held that he has such burden. *Leete v. The Gresham Life Insurance Co.*, 7 Eng. Law and Eq., 578. The defendants in the case at bar

Wilkins v. The Germania Fire Insurance Company.

averred a breach of warranty, and, according to the case above cited, should not afterwards be allowed to say that they did not have the burden of proving it.

There is another view which may be taken, and which seems to us entirely conclusive, that the burden in this case was upon the defendants. The breach of warranty alleged in this case, if proven, would have shown a want of good faith. It would have appeared that the plaintiff had procured the contract by statements which he knew at the time were not true. Now, fraud is never to be presumed, but the reverse. The precise question arose in the case last above cited. It was held that the allegations of falsehood made by the defendants amounted to fraud, and that it was incumbent, therefore, upon the defendants to prove them, because the presumption is always in favor of innocence and against fraud.

In the absence then of any evidence tending to show that the plaintiff knew that there were exposures on the east, within one hundred and fifty feet, besides the two frame buildings mentioned, the plaintiff's right of recovery must be sustained so far as this ground is concerned.

II. Another breach of warranty is alleged to consist in the fact that the building insured was described as two stories high. 2. —; —: It is shown that only the main part was two stories ^{description}_{of building.} high and that there was a small, rear addition only one story high. There was evidence tending to show that the plaintiff was not wholly unacquainted with the building, and we think that a court or a jury might well have believed that he knew that the whole building was not two stories high. But we are unable to conclude that there was any such misdescription as to constitute a breach of warranty. The building was in fact a two-story building. It would, we think, be usually so denominated, notwithstanding the one-story rear addition. The description in regard to height pertained, as it appears to us, rather to identification than the character of the risk; and where this is so not quite the same accuracy is required.

Wilkins v. The Germania Fire Insurance Company.

III. The defendants insist that there was no evidence of the value of the house, and that no recovery should have been allowed for that reason. The plaintiff estimated the house at \$800, but upon cross-examination it was made to appear that he included a few dollars for damage done to the foundation walls, also the value of an ice-box, built into and constituting a part of one of the walls of the house, and also an awning. The judgment rendered was for \$700. No estimate was placed upon the value of the ice-box or awning, and so it is said that the value of the building, which alone, exclusive of the fixtures, was covered by the policy was not shown. In our opinion the foundation walls, ice-box, and awning were a part of the building, and were covered by the policy. It is true "store furniture and fixtures" appear by the terms of the policy to be excluded, but we understand by the language used that the only fixtures excluded were store fixtures, and it is not claimed that any fixtures were included in the estimate which could be considered such.

IV. It is said that the plaintiff was not entitled to recover, because his proofs of loss showed false swearing and attempted fraud, and that the policy expressly provides that false swearing, or attempted fraud, shall cause a forfeiture of all claims under the policy. But this defense was not made in the answer.

V. Lastly, it is said, that proofs of loss were not made in time. But it appears to us that this question is not reviewable by us. The proofs were admitted, and upon the theory that they were made in time. The defendants objected to their admission expressly upon that ground, and the court overruled their objection to which the defendants excepted. But the case comes to us upon appeal from an order overruling the defendant's demurrer to the evidence, or what was equivalent thereto, a motion to take the case from the jury, and to dismiss the same for

3. —: evi-
dence of
value: ver-
dict.

4. —: proof of loss:
motion to
dismiss:
practice.

Wilkins v. The Germania Fire Insurance Company.

insufficiency of the evidence. Where a party excepts to the admissibility of evidence, and afterwards demurs to the evidence, or moves to dismiss for insufficiency of the evidence, he must be deemed to have waived his exception to the admissibility. *Chapin v. Bane*, 1 Bibb., 612; *Lewis v. Few*, 5 Johns, 1. The reason for the rule will be apparent by considering that where evidence has been admitted, under an express ruling as to its admissibility, the party introducing it has a right to rely upon it until it is expressly excluded, and if it is excluded, he has a right to supply other evidence, if he can, or to take such other course as the exigency of his case may seem to require. In admitting the proofs in the case at bar against the defendant's objection, that they were not served in time, the court must have held that there had been no laches on the part of the plaintiff, or that his laches, if any, had been waived. It seems probable to us that the court held that the plaintiff's laches, if any, had been waived. We find a stipulation signed by the defendants' attorneys, which after setting out the title of the case is as follows: "It is hereby stipulated that the above entitled cause shall be tried as soon as reached in its order after proofs of loss have been received by the companies, the same as if notice and proof of loss had been made prior to the commencement of the action, hereby waiving all objection on account of the omission by plaintiff to give such notice and furnish such proof of loss prior to the commencement of the action."

The defendants insist that the design of the stipulation was to merely waive the fact that the action was premature. It seems probable that it was construed by the court as a waiver of all laches in respect to the notice and proof of loss.

The defendants further insist that their attorneys had no power to waive more than the mere fact that the action was premature. The court might have held, and probably did hold, otherwise.

The question as to the sufficiency of this stipulation to con-

Marsh v. Mead & Company.

stitute a waiver of all laches is argued by the defendants, and we are asked to rule upon it. But it appears to us that we cannot properly do so. If the trial had been allowed to proceed, and the court had become satisfied that the proofs ought to be excluded it should, and we have no doubt would, have excluded them.

We cannot say what might have transpired in respect to the proofs, if the trial had proceeded. But the defendants arrested the trial. This they did while the proofs were in. They left nothing for the court to do but to pass upon the sufficiency of the evidence as it stood, and upon the supposition that it was all admissible.

In taking a ruling upon the motion, and in coming here upon appeal from the ruling thereon, it appears to us that we have nothing for review except the correctness of that ruling, and in that we find no error.

Several other points are made by the defendants, but we think they are substantially covered by the views which we have expressed.

AFFIRMED.

MARSH V. MEAD & CO. ET AL.

1. **Partnership: JUDGMENT AGAINST PARTNERS INDIVIDUALLY.** Where the petition, in an action against a partnership, did not ask for a judgment against the partners individually, it was irregular to render a judgment against them as individuals; but such judgment would not be void for want of jurisdiction, and could not be attacked collaterally.
2. **Tender: JUDGMENT: INJUNCTION.** Where the plaintiff in his petition for an injunction to restrain the collection of a judgment, pleaded payments upon the judgment, and also contested in good faith the validity of the entire judgment, a tender of the amount not claimed to have been paid before commencing the action was not necessary.

Appeal from Winneshiek District Court.

MONDAY, DECEMBER 19.

ACTION for an injunction to restrain an execution sale. The plaintiff avers that the judgment upon which the execution

Marsh v. Mead & Company.

issued has no validity, for want of jurisdiction in the court to render the judgment. He also avers that payments to the amount of about \$350 dollars have been made upon the judgment, but which have not been credited thereon. The defendants for answer denied all the material allegations of the petition. They also moved to dissolve the injunction. Several affidavits and counter-affidavits were filed upon the hearing of the motion. The same was sustained, and from the order sustaining it the plaintiff appeals.

C. M Brooks and Reed & Marsh, for appellant.

L. Bulis, for appellees.

ADAMS, CH. J.—The judgment appears to have been obtained in an action brought by the the defendants, Mead & Co., against a partnership, H. O. Marsh & Co. The judgment was rendered against H. O. Marsh alone. No copy of the pleadings in the case in which the judgment was rendered was set out, but there is a statement that the pleadings were introduced in evidence upon the hearing of the motion, and there is also a statement that they do not show the names of the individual partners, and do not show that any judgment was asked against them individually.

No objection is made by the appellee to this method of abstracting and as the conclusion which we have reached is adverse to the appellant upon this point, we shall assume that the pleadings introduced in evidence showed what he states they showed, and only that.

Where in an action upon a claim against a partnership, judgment is not sought against the partners individually, it is certainly irregular to render a judgment against them individually, and we are not prepared to say that such judgment against partners not served with notice might not be treated as void. But as against partners served with notice, we think, it would at most be merely irreg-

1. PARTNER-
SHIP: judg-
ment against
partners in-
dividually.

Marsh v. Mead & Company.

ular. The appellant contends that the firm and the members thereof are as distinct as two individuals, but this is evidently not so. Each partner owes the whole debt. A judgment against the firm by its firm name binds each member so far as the matters therein adjudicated are concerned. At least this was so under the Revision, because under it a judgment against the firm may be enforced by *scire facias* against the individual property of the partners. Section 2785. At the time this judgment was rendered the Revision was in force. Even partners not served, then, were regarded as before the court in some sense; in a still stronger sense partners served would be. In the action in which the judgment complained of was rendered, we may assume that H. C. Marsh, the present plaintiff, was served with notice or voluntarily appeared. It would have been proper for the court to render judgment against all the partners individually who have been served or who had appeared, if the petition had been drawn in the proper form for that purpose. Now, in our opinion, the lack of such form will not justify us in saying that the court was without jurisdiction. The judgment then cannot properly be assailed in a collateral proceeding like the present.

The plaintiff, however, avers that large payments have been made upon the judgment which have not been credited thereon.

2. TENDER: He shows that the payments were made to one judgment: Tappan, the attorney of record in the cause in injunction. which the judgment was obtained, and who had control of the judgment at the time the payments were made. The dates and amounts of payment are specifically set out.

The defendants do not in their answer deny these payments. The allegations in respect to the payments are contained in an amendment to the petition. No answer to this amendment appears to have been filed. The affidavits introduced by the defendants do not show that the payments were not made as alleged.

Now, while the dissolution of a temporary injunction rests

Tuffree v. The Incorporated Town of State Center.

much in the discretion of the court, it appears to us in view of the condition of the pleadings, and all that is disclosed by the affidavits, that the injunction should have been dissolved only as to that part not alleged to have been paid and that as to the other part it should have been continued to the hearing.

The appellees insist that the want of a tender before action was fatal to the plaintiff's claim, so far as it was based upon the allegations that the judgment had been partially paid. They cite *Sloan v. Coolbaugh*, 10 Iowa, 32. But that case differs from this. The question in that case arose upon demurrer to the petition. In the petition it was admitted that there was something due, but it was not averred that the amount admitted to be due had been tendered. The court held that the petition was defective. In the case at bar the petition does not admit that anything is due. The plaintiff sought by his petition to contest, in good faith, as we doubt not, the validity of the entire judgment. It was his right, we think, to have an adjudication upon that point. The want of a tender, therefore, of the part not alleged to be paid did not, we think, deprive him of the right to have the injunction as to the other part continued to the hearing.

REVERSED.

TUFFREE V. THE INCORPORATED TOWN OF STATE CENTER.

1. **Damages: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE.** Plaintiff, while riding in a buggy in one direction and looking and talking to persons in the other direction, drove into a child's swing suspended between the sidewalk and the traveled portion of the street, and was thrown out and injured. *Held*, that such person was guilty of contributory negligence and could not recover for the injury.

Appeal from Marshall District Court.

MONDAY, DECEMBER 19.

ACTION to recover for a personal injury. The plaintiff avers

57	538
106	429

57	538
124	690

57	538
126	563

57	538
129	30

Tuffree v. The Incorporated Town of State Center.

that the defendant negligently suffered one of its streets to become obstructed, and that she was thrown from a buggy by reason of the obstruction and received an injury.

The defendant denies all negligence upon its part, and avers that the plaintiff's injury, if she received any, was the result of her own negligence.

There was a trial by jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

James Allison and Brown & Binford, for appellant.

John M. Parker and O. Caswell, for appellee.

ADAMS, CH. J.—Evidence was introduced tending to show that the plaintiff was riding in a buggy, with another lady, upon one of the streets of State Center; that while so riding she paused at the house of a friend, having driven near the gate in front of the house; that a few feet in front of the house where she stopped a child's rope swing was suspended from the limb of a tree; that the plaintiff after starting to resume her journey drove against the swing; that it caught upon a projecting knuckle of the buggy top, and caused the buggy to be tilted, whereby the plaintiff was thrown out and received the injury of which she complains.

The jury made certain special findings which were in substance that the swing was at the side of the street near the sidewalk, and between the sidewalk and the traveled portion of the street; that it was daylight at the time, and the swing was in plain view in front of the plaintiff's horse, and only a few feet ahead when she started; that she had seen the swing but drove so close to it that it caught upon the buggy, whereby the buggy was stopped and partly overturned.

Notwithstanding these findings the jury rendered a general verdict for the plaintiff.

They must have done so, we think, under the supposition that there was some circumstance which was sufficient to ex-

1. DAMAGES:
personal inju-
ries: contrib-
utory negli-
gence.

Tuffree v. The Incorporated Town of State Center.

cuse the plaintiff in driving against the swing, when the same was directly before her and in plain sight.

It cannot be said of course that she was excusable because the swing was not apparently a dangerous object. If it was not apparently dangerous, then the town was not guilty of negligence in suffering the swing to be there.

It seems probable that the jury must have found that the plaintiff's attention was diverted at the time she drove against the swing, and that she was excusable upon that ground.

Upon looking into the charge of the court, we find an instruction given upon the theory that the jury might find that the plaintiff's attention was diverted when she drove against the swing, and that she was not, therefore, guilty of contributory negligence.

The jury were instructed that they might consider the presence of other ladies with whom the plaintiff was conversing, and all the surrounding circumstances, and that if she knew that the swing was there, or might have known it by the exercise of ordinary care, under all the circumstances, and she negligently drove into the swing, she could not recover. One of the circumstances which the court seems to have thought might have been sufficient to excuse the plaintiff, or at least which was to be considered with that view, was the presence of other ladies with whom she was talking. The instruction was excepted to and the giving of it is assigned as error. The question presented is as to whether the presence of other ladies with whom the plaintiff was talking had any tendency to excuse her. In our opinion it had not.

It was held, it is true, in *Greenleaf v. Dubuque & Sioux City R. R. Co.*, 33 Iowa, 59, that an employe of a railroad company is not necessarily guilty of contributory negligence in not avoiding a known and plainly visible danger. It was thought that the jury might find that he was not, if the service which he was performing at the time required his exclusive attention. But in our opinion we could not sanction the

 Thorpe Brothers & Co. v. Fowler.

instruction given in the case at bar, without going much further than the court went in that case. The plaintiff was manifestly not obliged to resume her journey until she had finished her conversation. When a person undertakes to drive a horse in one direction while looking and talking in a different direction, and no special exigency is shown, such person, we think, voluntarily assumes the risk of driving against whatever obstacles may be in the way, and cannot be said to be in the exercise of due care, especially when outside of the usually traveled part of the highway, and in the vicinity of a dwelling house where more or less obstacles are liable to be found. In our opinion the court erred in giving the instruction.

REVERSED.

THORPE BROS. & Co. v. FOWLER ET AL.

1. **Conditional Sale: WAIVER OF.** Where the sale and delivery of personal property was made with an agreement by the purchaser to give security for the purchase money, or do some act as a part of the transaction, such sale is conditional; and the title to the property does not pass until the thing is done by the purchaser, or is waived by the vendor.

57	541
111	30
57	541
112	680
57	541
415	419

2. **Landlord's Attachment: MORTGAGE: PARAMOUNT LIEN.** In May, 1878, plaintiff leased certain premises to F. by an oral lease. In May, 1879, F. purchased furniture for use on the premises, and nine months afterwards executed a mortgage thereon to secure the purchase-money. On October 1, 1880, the lessor levied a landlord's attachment upon the furniture for the last five and one-half months rent: *Held*, that the landlord had no lien for the rent in question, at the time the lien of the mortgage attached, and that the mortgage lien was paramount.

Appeal from Delaware District Court.

MONDAY, DECEMBER 19.

ACTION for rent, and to enforce a landlord's lien. A writ of attachment was issued and levied upon certain furniture used upon the premises. The lessee, the defendant Fowler, made

Thorpe Brothers & Co. v. Fowler.

no defense. Ford Bros. intervened as mortgagees of the property levied upon. They raised no question as to the existence of the plaintiff's lien, but they claimed that the lien of their mortgage was paramount. The court held that the plaintiff's lien was paramount, and rendered judgment accordingly. The intervenors appeal.

Bronson & LeRoy, for appellants.

Charles Husted, for appellee.

ADAMS, CH. J.—The case was submitted upon an agreed statement of facts, which are in substance as follows: In May, 1878, the plaintiffs leased the premises by oral ^{1. CONDITION- AL sale :} lease to the defendant, Fowler, for one year, with the privilege of five years. Fowler took possession of the premises and occupied the same as a hotel until the levy of the attachment, October 1, 1880, a period of about two years and four and a half months. The rent claimed is for the last five and a half months. The furniture levied upon was sold to Fowler by the intervenors in May, 1879, and was used upon the premises until seized by the plaintiffs under their writ. The sale to Fowler was upon credit, and the mortgage under which the intervenors claim was executed to them by Fowler to secure the purchase-money. But it was not executed until about nine months after the furniture was delivered to Fowler and placed by him upon the premises. After its execution it was recorded immediately. The foregoing are what we deem the essential facts, but there is one other fact embraced in the stipulation of facts upon which the intervenors greatly rely. They sold and delivered the furniture with an agreement with Fowler that he would secure the purchase-money by executing to them a mortgage upon the furniture, and the mortgage which was executed about nine months later, was executed in compliance with that agreement.

The lien for the rent in question is not paramount to the

Thorpe Brothers & Co. v. Fowler.

mortgage, unless it attached before the lien of the mortgage did. The intervenors contend that it did not, and in our opinion their position is well taken. We do not, however, reach this conclusion upon precisely the same reasoning adopted by them in their argument. They claim that the sale and delivery of the furniture having been made with an agreement on the part of Fowler to give them a mortgage upon it for the purchase-money, the title did not pass until the mortgage was executed. The correctness of this position may be conceded unless the execution of the mortgage was waived. It has been held repeatedly that where a sale and delivery of personal property are made with an agreement upon the part of the purchaser that he will give a promissory note, or security for the purchase-money, or do some other act as a part of the transaction, which includes the sale, such sale is conditional, and the title does not pass until the thing to be done by the purchaser is done by him, or is waived by the vendor. *Whitney v. Eaton*, 15 Gray, 225; *Stone v. Perry*, 60 Ill., 48; *Paul v. Reed*, 52 N. H., 136; *Russell v. Minor*, 22 Wend., 659.

Where personal property is sold upon a condition, and is afterwards delivered without anything being said in regard to the performance of the condition, or a long time is allowed to elapse before performance is insisted upon, a close question sometimes arises as to whether, as between the vendor and a third party claiming through the vendee, the conditions should not be deemed to be waived. A question of that kind might, perhaps, arise in this case were it not for a provision of statute, section 1922 of the Code, which precludes a person making a conditional sale of personal property from setting up title as against a creditor or purchaser of the vendee without actual notice, unless the conditional sale is reduced to writing, and is duly acknowledged and recorded. Under this statute, it appears to us to be immaterial whether the title passed or not prior to the execution of the mortgage. There is no pretense that the plaintiffs had

2. LANDLORD'S
lien: mort-
gage: para-
mount lien.

Thorpe Brothers & Co. v. Fowler.

actual notice of the intervenor's claim, and nothing had been done prior to the execution of the mortgage to give constructive notice of it.

But the intervenors insist that the plaintiffs were not creditors of Fowler, in respect to this rent, at the time the mortgage was executed and recorded. If they are correct in regard to such fact, then the mortgage must be held to be paramount, and that, too, without regard to whether the sale as originally made was conditional or absolute.

It is not necessary to entitle a landlord to a lien for rent, that the rent shall have already accrued. It is sufficient if he have a contract by reason of which the rent is thereafter to accrue. *Garner v. Cutting*, 32 Iowa, 547; *Martin v. Stearns*, 52 Iowa, 345. But did the plaintiffs have a contract in February, 1880, when the mortgage was executed by which the rent in question was to accrue? We are unable to discover that they had. The only contract shown is the oral lease made in May, 1878, which was good for only one year. Code, § 3674. Indeed, by its own terms it was to expire in one year, unless the lessee should elect and agree to hold for four years longer. Possibly, as he continued to hold, we ought to infer that at the end of the first year, he did elect and agree to hold four years longer. If he did so, he might perhaps be bound by the agreement for one year's rent thereafter, but in the absence of a written lease he was not bound for more.

In our opinion the stipulated facts do not show that the plaintiffs had a lien for the rent in question at the time the lien of the mortgage attached, and we think the court erred in holding their lien to be paramount.

REVERSED.

Witt v. Mewhirter.

87	846
119	288

WITT, GUARDIAN, V. MEWHIRTER.

1. **Guardian: LANDS OF WARD: REDEMPTION: TAX SALE.** A guardian may redeem the lands of his ward, sold for taxes, at any time before the execution of the deed, by payment to the auditor; after the execution of the deed he may redeem by an equitable action, under section 892, Code.
2. ———: **INTEREST OF WARD IN LAND: REDEMPTION.** Where the guardian holds a mortgage upon lands in trust for the ward, the ward has such an interest therein as will entitle him, or the guardian in his behalf, to redeem the land from tax sale.
3. ———: **ACTION TO REDEEM: WHEN BROUGHT.** Section 892, Code, does not limit the time within which the right of redemption attaches but prescribes the period of its duration. The action to redeem may be brought before the ward's disability is removed.
4. **Mortgage: HOLDER OF TAX-TITLE: REDEMPTION.** The holder of a tax-title has no right to redeem the lands, embraced in his deed, from a mortgage thereon held in trust for a minor.

Appeal from Union Circuit Court.

MONDAY, DECEMBER 19.

THE plaintiff brings this action for the purpose of redeeming, from a tax sale, certain lands, in which it is alleged the plaintiff's ward, Alvin Witt, a minor, had an interest at the time they were sold for taxes. The cause was tried upon an agreed statement of facts, and a decree was entered from which the defendant appeals.

McDill & Sullivan, for the appellant.*Wainwright & Miller*, for the appellee.

DAY, J.—The agreed statement of facts upon which the cause was submitted to the court below, omitting the exhibits referred to, is as follows:

"1. Alvin Witt was born May, A. D., 1866.

"2. Marilda Witt, formerly Marilda Decon, was duly appointed guardian of said minor, prior to January 1, 1873, and

Witt v. Mewhirter.

has at all times since been, and still is, guardian of said minor.

"3. On or about January, 1873, said minor being seized in fee of the lands in controversy in this suit, his guardian, upon due application to the proper court obtained an order for the sale of said lands.

"4. In pursuance of said order for the sale of said land, said guardian sold and conveyed said land to Edward Homewood and took from said Homewood and wife a mortgage for said unpaid purchase-money * * * all of which was duly approved by the Circuit Court of Union county.

"5. On the 6th day of June, A. D. 1877, plaintiff filed her petition, as guardian of said Alvin Witt, for the foreclosure of said mortgage, making defendants, James Mewhirter and John A. Brown, his grantor, parties defendant thereto.

"6. On the trial of said foreclosure suit plaintiff dismissed, without prejudice to the rights of said minor or the cause, as to defendants Brown and Mewhirter, and foreclosed as to the Homewoods only.

"7. Said land was sold on special execution to Marilda Witt, guardian of Alvin Witt, for the use of Alvin Witt, November 16, 1878, and redemption not having been made a regular sheriff's deed was executed to said guardian for the use of said minor, on the 17th day of November, 1879, and the said deed duly filed for record and recorded in the proper records on the same day.

"8. That Edward Homewood permitted the taxes on said land to become due and delinquent; that said lands were regularly sold for non-payment of taxes, and that three years after such sale the tax purchaser, J. A. Brown, obtained a regular treasurer's tax deed for said land.

"9. On the 28th day of June, A. D. 1877, said James A. Brown and wife, conveyed said lands to defendant James Mewhirter by special warranty deed.

"10. On the — day of ———, A. D. 18—, defendant,

James Mewhirter, by proper action, recovered possession of said land from Homewood, the plaintiff herein not being a party to said action nor consenting thereto, and the said Mewhirter retains his possession.

"11. On or about December 10, A. D. 1879, and prior to the commencement of this suit, plaintiff tendered to defendant Mewhirter the sum of one hundred and seventy-four dollars, which said sum was duly and legally tendered to said Mewhirter, and the right of redemption demanded, which tender and right of redemption was by said defendant refused and denied. On the same day said sum was deposited with the clerk of the court for said defendant, and has ever since and now remains with said clerk, subject to the order of said defendant for the purpose of redemption from said tax sale. It is agreed that Henry A. Witt, and Henry Alvin Witt, and Alvin Witt, are one and the same person, and that mistakes in any names mentioned in pleadings or agreed statement, may be corrected at any time. It is agreed that if the court shall find on the facts that plaintiff is entitled in this action to the relief prayed for, and to redeem from taxes, the amount necessary to redeem shall be determined by a commissioner to be appointed by the court, who shall compute the amount necessary to redeem under instructions given by the court, said commissioner to report at the next term. It is further agreed that if either party desire to prosecute an appeal from the decision of the Circuit Court, that this agreed statement of facts, with the exhibits attached thereto, contains all the evidence introduced on the trial in the Circuit Court.

The court decreed "that the defendant, James Mewhirter, have his election to redeem the premises in controversy herein * * * from the amount due under the foreclosure and sale of said premises on execution on the mortgage thereon, executed by Edward Homewood and wife to said plaintiff, * * or to compel plaintiff to redeem from the tax sale of said lands to J. A. Brown, and that defendant enter his election

Witt v. Mewhlrier.

with the clerk of this court within thirty days from the rising of court; and if he elect to redeem from said mortgage, that he have until the first day of the next term of this court to make such redemption, and if he elect to require plaintiff to redeem from said tax sale, then and in that event, the court hereby appoints S. W. McEldery, Esq., commissioner to determine the amount required to redeem therefrom, and that said commissioner report the same by the next term of this court."

I. Section 892 of the Code, is as follows: "If real property of any minor or lunatic is sold for taxes, the same may

1. GUARDIAN: be redeemed at any time within one year after
lands of ward: re- such disability is removed, in the manner specified
demption: in the following section, or such redemption may
tax sale. be made by the guardian or legal representative under section

890, at any time before the delivery of the deed." Appellant insists that this action to redeem is brought by the guardian, and that section 892 authorizes a guardian to redeem *at any time before the delivery of the deed*, which, by implication, denies him the right to redeem after the delivery of the deed. Appellant cites and relies upon *Pearson v. Robinson*, 44 Iowa, 413. A little attention to the sections in question, will render the error of appellant apparent. Section 890 of the Code provides that redemption may be effected by payment of the amount necessary to redeem to the county auditor. Under section 892 the real property of a minor or lunatic may be redeemed at any time within one year after the disability is removed, but to effect such redemption an equitable action must be brought in a court of record, as provided in section 893, except that the guardian or legal representative may, at any time before the delivery of the deed redeem under section 890 of the Code, by payment to the county auditor. The latter part of section 892 does not limit the time within which the guardian may redeem to the execution of the deed, but simply provides that before the execution of the deed he may redeem by

Witt v. Mewhirter.

payment to the county auditor. After the execution of the deed he may redeem by an equitable action as provided in section 893. That this is the true construction of section 893 cannot, we think, be questioned.

II. It is claimed, however, that at the date of the tax sale in question, the minor had not such an interest in the real

2. — : In- estate in question as would entitle him, or his
 terest of ward in guardian on his behalf, to redeem. From the ex-
 hibits attached to the agreed statement of facts, it
 land : re-
 demption.

appears that the court ordered the guardian to sell the lands in question for one-third cash, and the balance in six and nine months, secured by mortgage on the real estate sold. In accordance with this order the guardian sold the lands to Edward Homewood, and took from him and his wife a mortgage thereon, dated June 2, 1873, to secure the deferred payments amounting to \$2,129.60. This mortgage was to Marilda W. Decon, guardian, and is conditioned for the payment to Marilda W. Decon, guardian, of the sum secured. After the sale to Homewood and the execution of this mortgage, on the 31 day of November, 1873, the land in question was sold to J. A. Brown, for the delinquent taxes of 1872. Now, whilst the mortgage was executed to Marilda W. Decon, guardian, it is apparent from all the facts admitted in the case that she held the mortgage simply in trust for her ward, Alvin Witt. If the guardian had died insolvent, it is apparent, we think, that her creditors could not have subjected this mortgage to the payment of her debts, simply for the reason that the beneficial interest therein belonged to her ward. In *Rice v. Nelson*; 27 Iowa, 148, it is said "that any right, whether in law or equity, whether perfect or inchoate, whether in possession or action, amounts to ownership in the land, and that a charge or lien upon it constitutes the person claiming it an owner, so far as it is necessary to give him the right to redeem." And in *Burton v. Hintrager*, 18 Iowa, 348, it was determined "that the same interest which, if held by an adult, would

 Witt v. Mewhlrter.

give him the right to redeem within three years, will, if held by a minor, give such minor the right to redeem at any time within one year after removal of the disability." In *Burton v. Hintrager*, it was held the heir of the mortgagee, who was a minor at the time of the tax sale, had such an interest in land as entitled him to redeem. This case disposes fully of the position of the appellant, that the interest of a mortgagee is not such an interest in land as will entitle him to redeem, and holds that, whilst in the case of the death of the mortgagee, the mortgage passes to the executor or administrator, and not to the heir, still the administrator does not take it in his own right, but holds it in his fiduciary capacity, and in trust for the heir, who is in equity, in the absence of creditors, entitled to it. We entertain no doubt that the interest of the minor in the property in question is of such a character as to entitle him, or his guardian, on his behalf, to redeem.

III. It is claimed, however, that this action is prematurely brought, and that the right of redemption can be exercised under section 892, only after the disability has been removed, and within one year from that time. In our opinion section 892 does not limit the time within which the right of redemption attaches, but prescribes the period of its duration. In *Burton v. Hintrager*, 18 Iowa, 348; *Tullman v. Cooke*, 39 Iowa, 402; and *Lloyd v. Bunce*, 41 Iowa, 660, the right of redemption was allowed to parties still minors.

IV. It is insisted that the court erred in requiring the defendant to redeem from the plaintiff because he did not ask, in his answer, that he be allowed to redeem, and if this order is not erroneous, the court erred in requiring the defendant to redeem from the foreclosure and sale, and not simply from the mortgage. The position of appellant seems to be that as he was not made a party to the foreclosure proceeding, he may, in his own time, bring an action to redeem from the mortgage. But the de-

3. ———: action to redeem: when brought.

4. MORTGAGE: holders of tax title: redemption.

Witt v. Mewhirter.

fendant did not acquire his title under the mortgage, or any grantor of the mortgagor. His title comes from an independent source, and, if valid, vests in him the title of the minor, and of the mortgagor, and of every one else interested in the property. He was not a necessary nor a proper party to the foreclosure proceeding. He was under no obligation to redeem from the mortgage to protect his title, nor had he any right to so redeem. If the minor has no right to redeem from him, his title is absolute. If the minor has a right to redeem, he must submit to that right, and he cannot defeat it by redeeming from the minor. It follows that the court erred in allowing the defendant the election to redeem from plaintiff. The error, however, is to the prejudice of plaintiff, and not of defendant. As the plaintiff has not appealed, this error cannot now be corrected. But, as the defendant did not elect to redeem within the time limited in the decree of the court, we are of opinion that under the state of the record, the time for election should not be extended.

The cause will be remanded to the court below, with direction to deny to defendant any extension of the period within which to make his election to redeem, and to determine the amount which plaintiff shall pay to effect redemption, as contemplated in the original decree.

AFFIRMED.

Bradley & Sherman v. Delaware County.

BRADLEY & SHERMAN V. DELAWARE COUNTY.

1. **Waiver: BOARD OF SUPERVISORS: ALLOWANCE OF CLAIMS.** Where a claim was filed before the board of supervisors for medical attendance rendered to paupers upon the order of the proper township trustees, but was not certified by them to be correct, and the board considered the claim and allowed a portion of it without objection for want of such certificate, such action will amount to a waiver of the certificate, and will estop the county from setting up the want thereof, as a defense to the balance of the claim.

Appeal from Delaware District Court.

MONDAY, DECEMBER 19.

ACTION upon an account. The plaintiffs are physicians, and as such they furnished medicine and medical attendance at the written request of the trustees of Delaware township in Delaware county. The claim as presented to the board of supervisors, amounted to \$195.05. The board allowed thereon the sum of \$114.55, and refused to allow the balance. The action is brought to recover such balance.

The defendant for answer averred, among other things, that the plaintiffs' account was not certified to by the township trustees. The plaintiffs did not controvert the fact of the want of such certificate, but claimed that the board of supervisors waived the certificate.

The court instructed the jury in substance that an allowance of a part of the plaintiffs' account, without objection for want of certificate, would be a waiver of the certificate.

A verdict and judgment were rendered for plaintiffs. The defendant appeals.

Calvin Yoran and E. M. Carr, for appellant.

Bronson & LeRoy, for appellee.

ADAMS, CH. J.—The cause involving less than \$100 comes

Bradley & Sherman v. Delaware County.

to us upon a certificate. The question certified is as follows:

1. WAIVER:
board of su-
pervisors: al-
lowance of
claims.

“Where claims are filed before the board of supervisors of a county for medical attendance upon and care for the poor, on the order of the proper township trustees, which said claims are not certified to be correct by the trustees, but which claims the board of supervisors consider without objection for want of such certificate, and allow a part and disallow a part, does such action amount to a waiver of such certificate, estopping the county from setting up and establishing the want of such certificate as a defense in a suit brought for the balance of said claim?”

The defendant insists in the first place that the board of supervisors had no power to waive the certificate. In support of this doctrine the defendant cites *Hull & Argalls v. The County of Marshall*, 12 Iowa, 154; *Webster County v. Taylor*, 19 Iowa, 117; and *Clarke v. The City of Des Moines*, 19 Iowa, 219. It is not necessary for the purposes of this case to go into an extended review of the cases cited. An examination of them will show that they differ materially from the case at bar. That a county, through its proper officers, may allow and pay a claim of the nature of the plaintiffs' is, of course, disputed by no one. The objection made is simply to the mode of allowance. This consideration alone is sufficient to show the inapplicability of the cases cited.

On the other hand the defendant's position that the board of supervisors has no power to waive the township trustees' certificate is in conflict with *Armstrong v. Tama County*, 34 Iowa, 314; and *Collins v. Lucas County*, 50 Iowa, 448. In the former case, it is true, no more was allowed by the court of the uncertified claim than was allowed by the board, but this court held that to the extent of the allowance the county was estopped to deny the claim. This ruling could have been made only upon the theory that the allowance was not without jurisdiction, and that to the extent of the allowance the board had power to waive and did waive the certificate.

Bradley & Sherman v. Delaware County.

It being settled, then, that the board has power to waive the certificate, we have only to inquire whether the action of the board in this case was such as to constitute a waiver.

The jury was instructed upon the theory that the evidence was such that they might find that no objection was made to the claim by the board for want of a certificate. The question certified assumes that no objection was made, but that the board of supervisors considered the claim without objection. We cannot go into the evidence to determine whether such assumption was justified, because no question in relation thereto is raised. We shall, therefore, proceed upon the same assumption.

A waiver need not be expressed in words. Wherever the conduct of a party is such as to raise a reasonable presumption that a waiver was intended, and there is nothing indicating otherwise, a court or jury would be justified in finding that there was a waiver.

The want of the trustees' certificate to the claim, when it was presented to the board, would have justified the board in refusing to consider it. This, we must presume, they well knew. They, nevertheless, proceeded to consider it. They passed over the fact that there was no certificate, and certainly treated it for the time as immaterial. If they had refused to consider the claim for want of a certificate, the claimant would have been advised of its necessity and might have supplied it. But the board had other grounds for disallowing the claim, as far as they did disallow it, and they acted upon those grounds. With the view which the board took of the claim, the trustees' certificate was in fact immaterial. There is no pretense that they would have been bound by it, if it had been supplied, and if they were satisfied, as they claimed to be, that the claim, so far as they disallowed it, ought to be disallowed upon its merits, it would have been their duty to disallow it. We think the case comes clearly within the ruling in *Collins v. Lucas County*, above cited.

Meyers v. The C., R. I. & P. R. Co.

The county has had the benefit of a full defense to the claim upon its merits. If a certificate of the nature of the one in question is admissible as evidence in an action upon the claim, then the want of such certificate in this case was to the disadvantage of the plaintiffs, and not the county.

Much is said in the argument of appellant's counsel about the protection which counties need. But if they need any protection in this respect, it is against the allowance, and not against the disallowance by the board of uncertified claims. The disallowance remits the claimant to his action, and compels him to establish his claim by such legal methods as other claims are established. An allowance by the board is conclusive upon the county. Yet, as we have seen, it was held in *Armstrong v. Tama County*, above cited, that an allowance may be made by the board without the trustees' certificate.

In our opinion, there was no error in the rulings of the District Court, and the judgment must be

AFFIRMED.

MEYERS V. THE C., R. I. & P. R. Co.

1. **Municipal Corporations: ORDINANCE: LIMITING SPEED OF RAILWAY TRAINS.** Municipal corporations have power, as a police regulation, to pass ordinances regulating the speed of railway trains within the corporate limits, but such regulations must be reasonable and proper.
2. — : — : **UNREASONABLE AND VOID.** Where an ordinance of a city limits the speed of railway trains to four miles per hour, and the road passes through agricultural lands, fenced on both sides, for three miles after entering the limits of the city, and before reaching the inhabited portion thereof, such ordinance operates as a restraint upon commerce, and, as to such portion of the road, is unreasonable and void.

Appeal from Pottawattamie Circuit Court.

MONDAY, DECEMBER 19.

THE plaintiff claims of the defendant one hundred and five dollars, for the killing of a cow. The cause was tried to the

57	555
85	508
57	555
90	109
90	772
57	555
99	407
57	555
115	58
115	296
57	555
128	53
128	54
57	555
142	739

Meyers v. The C., R. I. & P. R. Co.

court on an agreed statement of facts. Judgment was rendered for the defendant. The plaintiff appeals.

Sapp & Lyman and Ament & Sims, for appellant.

Wright & Baldwin, for appellee.

DAY, J.—Upon the trial it was agreed that the animal in controversy was killed by a train of the defendant, running upon the track of its railroad, at a point within the limits of the city of Council Bluffs; that the value of the animal killed was one hundred and five dollars; that the train was running at a greater rate of speed than four miles per hour; and that an ordinance of the city of Council Bluffs, in force at the time the animal was killed, prohibited the running of trains at a greater rate of speed than four miles an hour. It was admitted by the plaintiff that the only negligence that the defendant had been guilty of was, as they claim the violation of the ordinance of Council Bluffs prohibiting trains from running at a greater rate of speed than four miles an hour. A plat of the city of Council Bluffs is attached to the abstract, which, in connection with the agreed statement of the parties, shows that the defendants' line of railway enters the limits of said city one and one-quarter miles from the laid out portions of the city, and remains that distance for two and one-quarter miles, running just inside of the city limits; that the railway is fenced on both sides except at public crossings, from the point where it enters the city limits up to Cassady's addition, which is the first platted addition; that the character of the land where the Chicago, Rock Island & Pacific Railroad runs through the city of Council Bluffs, up to Cassady's addition, is farm or agricultural lands; that there are no laid out streets of the city of Council Bluffs crossing said track, on said agricultural ground, the only crossings over the track being the public highways laid out by the county, and that the animal was

Meyers v. The C., R. I. & P. R. Co.

killed upon one of these crossings one and one-half miles from the laid out portion of the city. It further appears, that the railroad runs three miles within the limits of the city, through farm lands, fenced on both sides, before it reaches the first laid out addition of the city, and that the distance from the point where it first enters the city limits to the Union Pacific Railroad depot is more than five miles.

The ordinance of the city in question is as follows: "Whoever as engineer, conductor or other employe of any railroad company, shall run any locomotive, with or without cars attached, or any hand-car, at a speed to exceed four miles an hour, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than five nor more than fifty dollars for each offense."

The city of Council Bluffs is incorporated under a special charter. The plaintiff claims for the city authority to pass the ordinance in question, under section 26 of its charter which provides: "The city council is invested with authority to make ordinances to secure the inhabitants against violation of the law * * * and in general to provide for the safety and prosperity and good order of the city * * * and the comfort and convenience of the inhabitants, and to impose penalties for the violation of its ordinances." * * *

It is conceded by the defendant that under this section the city of Council Bluffs has the right to pass an ordinance regulating the speed of railway trains. It is claimed, however, that the regulation is a police regulation, and to be valid must be reasonable and proper, and not simply convenient; that the ordinance in question is unreasonable, oppressive and vexatious, and therefore, void.

In 1 Dillon on Municipal Corporations, § 319, it is said: "In this country the courts have often affirmed the general
2 —: —: incidental power of municipal corporations to
unreasonable
and void. make ordinances, but have always declared that
ordinances passed in virtue of the implied power must be

Meyers v. The C., R. I. & P. R. Co.

reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State." That courts may declare void an ordinance passed by a city, in virtue of its implied powers, is fully sustained by the following authorities: *Hayes v. The city of Appleton*, 24 Wis., 542; *Austin v. Murry*, 16 Pick., 121; *Dunham v. Trustees of Rochester*, 5 Cowen, 462; *T. W. & W. Railway Co. v. Jacksonville*, 67 Ill., 37; *Ex parte Frank*, 52 Cal., 606; *Kip v. Patterson*, 2 Dutcher, 192; *Commissioners v. Gas Co.*, 12 Pa. St., 318; *Waters v. Luch*, 3 Ark., 110; *Mayor v. Winfield*, 8 Humph., 707; *Clason v. Milwaukee*, 30 Wis., 316; *Clinton v. Phillips*, 58 Ill., 102; *Tugman v. Chicago*, 78 Ill., 405. Whether a by-law or ordinance be reasonable is a question for the court. *Commonwealth v. Worcester*, 3 Pick., 461; *State v. Overton*, 4 Zab. (N. J.), 435. Under the ordinance in question, in this case, it would take three-quarters of an hour, after entering the corporate limits of Council Bluffs, to pass over three miles of railroad, through agricultural lands, fenced on both sides and reach the inhabited portion of the city, and it would take over one hour and a quarter to reach the terminus of the railroad at the Union Pacific depot. One of the objects of railroads is to secure quick transportation for freight and passengers. The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably impedes the whole traveling public. No necessity has been shown, and none certainly exists, for limiting railways to a speed of four miles an hour, for three miles before they enter the inhabited portion of a city, and whilst passing through agricultural lands fenced upon both sides. If all the cities situated along the line of the defendants' road between Council Bluffs and Chicago, should enact and enforce a like ordinance, it is apparent that the time between the two cities would be greatly increased. The ordinance operates as a restraint upon commerce, and, in our opinion, ought not to be sustained. The

 Thompson v. French.

court did not err in refusing to hold the defendant liable for a violation of it.

AFFIRMED.

THOMPSON V. FRENCH.

1. **Appeal:** CERTIFICATE OF JUDGE. Where the amount in controversy, as shown by the pleadings, was less than \$100, and no certificate of the trial judge was given, the appeal must be dismissed.

Appeal from Plymouth Circuit Court.

MONDAY, DECEMBER 19.

ACTION upon two promissory notes executed by the defendant, one for \$35, and one for \$50. The defendant admits the execution of the notes, but he avers that there is not more than \$40 due on both of them. He avers that they were given for a mowing-machine, bought in August, 1878; that he bought the machine with a warranty, and that the warranty has been broken; that the price of the machine was \$95, and it was not worth more than \$50. There was judgment for the plaintiff for the full amount claimed. The defendant appeals.

Curtis & Dudley, for appellant.

J. H. Struble, for appellee.

ADAMS, CH. J.—The first question presented is as to whether this court can take cognizance of this appeal without a certificate from the trial judge. The amount in con-

1. APPEAL:
certificate of
judge.

troversy, as shown by the pleadings, is the difference between what the plaintiff claims and what the defendant concedes that he is entitled to recover, or in other words, the amount in controversy as shown by the pleadings is the amount of damages which the defendant in his answer claims that he sustained. There is no averment in the answer that the ma-

Dodge v. The City of Council Bluffs.

chine, if it had fulfilled the warranty, would have been worth more than the purchase price. The answer then does not show that the damages sustained by the defendant were more than \$45. That, then, constitutes the amount in controversy as shown by the pleadings, and being less than \$100 the case was appealable only upon the certificate of the trial judge. As no such certificate was given the appeal must be

DISMISSED.

DODGE ET AL. V. THE CITY OF COUNCIL BLUFFS ET AL.

57	560
86	724
57	560
101	696
57	560
130	677
130	678

1. **Corporations: FOREIGN: POWERS OF.** The powers possessed by a foreign corporation, organized for the purpose of supplying water for municipal and other purposes, are not restricted to the State in which it is incorporated, but it may extend its operations and do business and acquire interests in other States, although not expressly authorized so to do by the laws of the State where incorporated.
2. **Municipal Corporations: FOREIGN CORPORATIONS: POWER TO CONDEMN PROPERTY.** A municipal corporation has authority, under sections 471-4, Code, to contract with a foreign corporation for the construction of water-works, and where it does so contract such foreign corporation, under the statute and a proper ordinance, may have power to condemn and appropriate private property necessary for the works.
3. ———: **POWER OF STATE TO CONTROL.** The fact that the State of Iowa has reserved control over its own corporations, and cannot control foreign corporations, will not prevent the transaction of all ordinary business in the State by foreign corporations, nor prohibit them from appropriating private property when necessary.
4. ———: **WATER-WORKS: EXCLUSIVE RIGHT.** The plaintiffs, as mere taxpayers, cannot raise the question whether the city had power to grant by ordinance to one company, the exclusive right to construct and operate water-works.
5. ———: **ORDINANCE: ASSIGNMENT OF RIGHT.** Where the ordinance granting the right to construct water-works provided that the company might assign all its rights and privileges, the provision, if void, would not affect the right of the company to proceed with the work.
6. ———: **EQUITY: CONTINGENT INJURIES.** Courts of equity are not

Dodge v. The City of Council Bluffs.

bound to prevent possible or contingent injuries, and a provision of the ordinance that if the special tax was inadequate to pay the water rentals the deficit should be paid from the general revenues, will not warrant interference.

7. **Injunction: ORDINANCE: PUBLICATION.** An injunction cannot be maintained merely on the ground that the ordinance had not been published for the length of time provided by the city charter.

Appeal from Pottawattamie District Court.

MONDAY, DECEMBER 19.

ACTION for an injunction to restrain the defendants from enforcing and carrying out a certain ordinance providing for supplying the city of Council Bluffs with water. The petition shows that the defendants, other than the city of Council Bluffs are members, officers, and agents of the American Construction Company, incorporated under the laws of New York for the purpose of supplying water for municipal and other purposes; that the company has no office or place of business or agency outside of the State of New York; that in January, 1881, the common council of the defendant city passed an ordinance conferring upon the company the exclusive privilege of laying pipes under the streets and alleys of the city, and of supplying the city and its inhabitants with water for fire protection, for manufacturing purposes and domestic use; that the ordinance purports to bind the city for the payment of money as water rental; that the company has accepted the terms of the ordinance; and that unless restrained the company will proceed to carry into effect the provisions of the ordinance by the construction of water-works and the city will, under the ordinance, levy taxes and impose great financial burdens upon the tax-payers of the city, among whom are the plaintiffs. The petition avers that the ordinance is void; that it has never been duly published; that it contains illegal provisions and is grossly inequitable; that it provides for payments outside of the special tax authorized by law for the payment of water rentals; and that it is in violation of the constitution

Dodge v. The City of Council Bluffs.

and legislative policy of Iowa. The petition further avers that the laws of New York do not authorize the formation of corporations for the construction of water-works outside of that State, and that the company whose officers are sought to be restrained has no power to enter into a contract with the defendant city under the ordinance.

To the petition the defendants demurred on the ground that it does not appear that the ordinance is void, and furthermore, if it is, it does not appear that the plaintiffs are threatened with such injury that they are entitled to an injunction.

The court sustained the demurrer, and the plaintiffs electing to stand upon their petition, judgment was rendered dismissing the petition. The plaintiffs appeal.

Clinton, Hart & Brewer and Sapp & Lyman, for appellants.

Wright & Baldwin and G. A. Holmes, for appellees.

ADAMS, CH. J.—It is not claimed that the defendant city has no power to provide by ordinance for the construction of water-works. It would be conceded that it has the power to do so, and even to provide for their construction by a corporation. The claim is that it has no power to provide for their construction by a foreign corporation, and especially by a foreign corporation like the American Construction Company, which is not expressly authorized by the laws of the State in which it is incorporated to extend its operations outside of the State. In our opinion this claim cannot be sustained. It is true a corporation can exercise no powers except such as are expressly granted and such as are reasonably incident thereto. But the power possessed by the American Construction Company to construct water-works appears to be ample. The articles of incorporation are set out, and they expressly provide for supplying water for municipal purposes. But it is said that by fair construction they must be held to mean only, for supplying water

1. CORPORATIONS: foreign: powers of.

Dodge v. The City of Council Bluffs.

for municipal purposes in the State of New York. We are asked to engraft upon the articles, by judicial construction, this restriction. Now, we might, perhaps, feel justified in doing this if we could see anything in the nature of the business to lead us to think that the incorporators contemplated such restriction, but we do not. We think that they designed to make their field of operation as extensive as the cities needing their works. This appears to us to be the fair construction. Having reached this conclusion it only remains to be said upon this point, that the articles of incorporation must be taken to be the measure of the company's rightful power in the absence of any showing that the articles themselves are illegal. They are not, with the construction which we put upon them, in the nature of things, illegal, nor can they be held to be so merely by want of a statute in New York authorizing the company to do business or acquire interests beyond the limits of the State. It has never been held, so far as we are aware, that the right of a corporation to do business, or acquire interests beyond the limits of the State in which it is created, exists only by an express grant from the legislature of such State.

It is true it has been said that "a corporation must dwell in the place of its creation." *Bank of Augusta v. Earle*, 13 Peters, 519. Being an artificial person, a mere creature of law, it cannot go where the law by which it exists cannot go. An extra territorial corporate meeting, for instance, would be illegal. But a corporation is not for this reason prevented from sending its agents abroad for the transaction of business. *Bank of Augusta v. Earle*, above cited.

But is said that conceding that the American Construction Co. might make contracts, and do many kinds of business in

2. MUNICIPAL Iowa, yet, being a foreign corporation, it cannot
 corporations: acquire such rights as the ordinance in question
 foreign cor- purports to confer. The argument is that it is only
 porations: power to
 power to condemn
 property. by inter-state comity that the right of a corporation

Dodge v. The City of Council Bluffs.

to make and enforce any contracts elsewhere than in the State where it is created is recognized; that the rights granted by the ordinance in question are in the nature of a public prerogative franchise, and that inter-state comity cannot properly be held to extend to such rights.

The ordinance confers upon the company the right to condemn and appropriate private property necessary for the construction and operation of the water works. This right, it is said, cannot properly be granted to a foreign corporation. The plaintiff's rely upon the following authorities: *Runyon v. Coster's Lessee*, 14 Peters, 128; *Nashville Railway v. Comardin*, 11 Humph., 348; *State v. Railroad Co.*, 25 Vt., 435; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 397; *Newbury Petroleum Co. v. Weare*, 27 Ohio St., 353; *Arm v. Conant*, 36 Vt., 749; *Thompson v. Waters*, 25 Mich., 221; *Aspenwall v. O. & M. R. Co.*, 2 Ind., 492; *Holbert v. St. Louis, K. C. & N. R. Co.*, 45 Iowa, 26. In the last case it was held that a railroad company incorporated in another State has no power in this State to condemn land for a right of way. Under that decision, and others above cited, we are not prepared to say that the American Construction Co. could, by reason of considerations of mere inter-state comity, be allowed under any ordinance which the defendant city could pass, to condemn and appropriate private property for the construction and operation of its water-works, but it is certainly competent for the legislature to grant such power, and in our opinion, the legislature has granted it. Section 474 of the Code provides that cities and towns are authorized to condemn and appropriate so much private property as shall be necessary for the construction and operation of water-works, and when they shall authorize the construction and operation thereof by individuals or corporations they may confer by ordinance upon such person or corporation the power to take and appropriate private property for said purpose." Now, while in form the power is not granted directly by the legislature to the proprietor of the water-works,

Dodge v. The City of Council Bluffs.

where the proprietor is other than the city or town, yet no point of that kind is raised by the plaintiffs' counsel, and none, we think, could be properly. The legislative intent to confer the power is abundantly manifest. This, we think, would not be questioned where individuals or a domestic corporation is proprietor. But it is said that we are not justified in supposing that the legislature contemplated a case where a foreign corporation is proprietor. In our opinion the statute will not justify the narrow construction which the plaintiffs would put upon it. The power given to cities and towns to contract with corporations for the construction and operation of water-works is general. If the intention had been to restrict them to domestic corporations it would have been easy to expressly so provide. But we cannot think that any such restriction was contemplated or deemed desirable. Where works are to be constructed for municipal purposes, requiring no inconsiderable capital, manufacturing facilities, experience, and skill, it is of great importance to cities and towns to be allowed to contract wherever and with whomsoever they can do so to the best advantage. Regarding this statute as conferring upon cities and towns the right to contract for water-works with foreign as well as domestic corporations, it follows, we think, that where a city or town does contract with a foreign corporation, such corporation may, under the statute, and a proper ordinance, have the right to condemn and appropriate private property necessary for the works.

At this point it is proper that we should consider one other objection urged to this view. It is said that it is contrary to

the legislative policy of Iowa, as evinced by a provision of statute, whereby corporate powers are granted with a reservation, by which the legisla-

b. —: —: power of the state to control.

ture has the right to control articles of incorporation, by-laws, rules, and regulations of corporations. Code, § 1090. Now, the plaintiffs' argument is that as the legislature of Iowa cannot control the articles of incorporation, by-laws,

Dodge v. The City of Council Bluffs.

rules, and regulations of foreign corporations, the legislature did not intend that cities and towns should be allowed to contract with foreign corporations for water-works. But this reasoning, it appears to us, would carry us too far. Corporations sustain no practical relation to the State or the inhabitants thereof except so far as they do business. The objection, then, is to corporations doing business in this State without their articles of incorporation, by-laws, rules, and regulations being subject to the control of the legislature of this State. But we cannot hold that the legislature intended to prevent foreign corporations from doing business here. The true idea appears to us to be this: Every State has the power to reserve control over its own corporations. Iowa has done so to a limited extent, but this does not prevent the transaction here by foreign corporations of all ordinary business, nor does it indicate that the statute in question should be so construed as to prevent them, under a proper ordinance, from condemning and appropriating private property.

But it is said that conceding that the defendant city had the power to pass an ordinance, providing for the construction and operation of water-works by a foreign corporation, the ordinance passed is objectionable and a court of equity ought to declare it void.

4. ____:
water-works:
exclusive
right.

The ordinance purports to grant an exclusive right. Whether it was competent for the city to grant such right we need not determine. If we should conclude that it was not, it is manifest that the ordinance would not be void. It would result merely that the right granted is not exclusive, and the plaintiffs as mere tax-payers cannot properly raise that question. Such question cannot properly be raised until a conflict arises between the American Construction Co. and some person or persons, or corporation, claiming also a right from the defendant city to construct and operate water-works. *Grant v. The City of Davenport*, 36 Iowa, 406.

The next objection urged is that the ordinance permits an

Dodge v. The City of Council Bluffs.

improper assignment by the American Construction Co. The provision objected to is in these words: "The American Construction Co. shall have the right to make an assignment of all its rights and privileges under this ordinance to a water-works company which it may form under the laws of Iowa." Now, it is said that the American Construction Co. assumed certain obligations, and that the contract must have been entered into by the city in reliance upon its responsibility and character; that the city should not be allowed to provide in advance that the company might shift its obligations to another corporation which might lack the requisite responsibility and character. But we do not feel called upon to determine this question. Possibly the provision is void, but if so it would not give plaintiffs the right to the injunction prayed for. It would not affect the right of the company to proceed with its works.

Several other objections are urged to this ordinance, which do not, in our opinion, go to the validity of the ordinance itself, but which raise some merely incidental questions as to what can be done under the ordinance, and which it will be time enough to consider when the things provided for are attempted, and when we have before us as plaintiffs persons aggrieved thereby. Some other objections are urged, but they go merely to the wisdom of the ordinance, and they are not such that we should be justified in declaring it void.

One objection, however, deserves a separate consideration. The ordinance provides, in substance, that if the special tax authorized by law to be levied by the city for the payment of water rentals shall prove inadequate for that purpose, the city shall pay the deficit out of its current annual revenues.

Section 475 of the Code provides for the levy of a special five mill tax for the payment of water rentals. There is certainly some reason for thinking that that was designed to be the limit. Now it is said that the company was proceeding to con-

5. ——— : ordi-
nance : as-
signment of
right.

6. ——— :
equity : con-
tingent injur-
ies.

Dodge v. The City of Council Bluffs.

struct its works in reliance in part upon the general revenues of the city, and it behooved the plaintiffs to interpose their objection in the outset to any payments therefrom; for they would be estopped from doing so after the company had expended money under the provisions of the ordinance. It has certainly been held that tax-payers may by delay and apparent acquiescence estop themselves from applying to a court of equity for an injunction to prevent the improper use of public funds. *Tash v. Adams*, 10 Cush., 253. On the other hand it has been held that such estoppel does not arise where the complainant's rights are clear, and the party setting up the estoppel must be deemed to have acted at his peril. *Borden v. Stein*, 17 Ala., 104. The defendants, in the case at bar, claim that whatever rights the plaintiffs have, if any, must be determined by a construction of the statute of which the defendants were bound to take notice. Whether this is a sufficient answer to the plaintiffs' position we need not determine. It is not certain there will be any deficit to be made good out of the general revenue. This action, so far as this point is concerned, is brought upon a mere contingency. Courts of equity lend themselves to prevent injuries which are imminent, not merely possible. The plaintiffs, it is true, aver that there will be a deficit; but we cannot hold that the demurrer admits the truth of this averment, because it is impossible, in the nature of things, to know that there will be a deficit.

Finally, it is said that the ordinance is invalid for want of due publication. The plaintiffs rely upon a provision of the original charter requiring ordinances to be published ten days, and the petition avers that this ordinance was not published that long. But an action of this kind cannot be maintained merely on the ground that at the time the action was brought publication of the ordinance was incomplete.

In our opinion the judgment of the District Court must be

AFFIRMED.

7. INJUNCTION: ordinance: publication.

 Jarosh v. Easton.

JAROSH V. EASTON ET AL.

1. **Fraud: CONFESSION OF JUDGMENT: EVIDENCE.** Evidence considered and held not sufficient to support the conclusion of the court below, that the signature to a certain *cognovit* was procured by fraud.
1. **Cognovit: JUDGMENT: SURETY.** A certain *cognovit*, set out in full in the opinion, construed not to authorize a judgment against a party who signed the same as surety.

Appeal from Winneshiek Circuit Court.

MONDAY, DECEMBER 19.

ACTION in chancery to enjoin the sale of plaintiff's property upon an execution issued on a judgment by confession against him and others. There was a decree granting the relief prayed for. Defendants appeal.

Willett & Willett, for appellants.

L. Bullis, for appellee.

BECK, J.—I. A judgment by confession was rendered in the Circuit Court in favor of James H. Easton, and against John Kavorek and Jean Suchan, as principals, and the defendant Jarosh, as surety, upon a *cognovit* which is in the following language:

"JAMES H. EASTON, v. JOHN KAVOREK, JEAN SUCHAN, <i>Def'ts.</i>	}	<i>Confession of judgment, in Circuit Court, Winneshiek county, Iowa.</i>
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"We, John Kavorek and Jean Suchan of— township, in the county of Winneshiek, and State of Iowa, defendants above named, do hereby confess that we are jointly and severally justly indebted to James H. Easton of Decorah, Iowa, plaintiff above named, in the sum of one hundred and forty (and \$15 attorney's fees as provided for in said note) dollars, with

Jarosh v. Easton.

interest at ten per cent per annum, from the 22d day of February, 1878, and we do hereby authorize the clerk of the Circuit Court of said county and State to enter a judgment in said court in favor of said plaintiff, and against us and each of us as defendants, * for the sum of one hundred and forty (\$15 attorney's fee and \$3.50 costs) dollars, with interest at ten per cent per annum, from the 22d day of February, A. D. 1878, and costs. It is stipulated and agreed that the interest on said judgment shall be paid semi-annually, so long as the said judgment remains unpaid, and if default be made in the payment of said interest, or any part thereof, at the time the same becomes due, then at any time thereafter on application of the plaintiff to the clerk therefor, execution shall immediately issue for the whole amount of said judgment, principal, interest and costs.

" This confession of judgment is for a debt justly owing and now due to said plaintiff, and the following is a concise and true statement of the facts, out of which the said debt arose, to-wit: On the 22d day of February, 1878, at our request, James H. Easton, the plaintiff herein, loaned us the sum of one hundred and forty dollars, for which we did on that day execute to said plaintiff a promissory note for the whole amount, payable November 15th, 1878, and interest at ten per cent per annum, payable quarterly. Said note is now unpaid and this judgment is confessed to secure payment of said note and interest, \$15 attorney's fee and \$3.50 costs, and we further state that the said sum, above confessed, is justly owing and now due to said plaintiff from us, and each of us, without any fraud or illegal consideration whatever. And it is further understood that execution is not to issue on this judgment until the 1st day of November, A. D. 1879, provided that default be not

* I, Albert Jarosh, do hereby bind myself as surety for the faithful performance and payment of the within judgment, and for that reason I sign my name and acknowledge myself surety on this confession of judgment.

Jarosh v. Easton.

made in the payment of interest when due, as above provided.

“Dated, Spillville, Iowa, December 26, 1878.

JOHN KAVOREK,

JEAN SUCHAN,

Surety, ALBERT JAROSH, *Defendant*.

“STATE OF IOWA, { ss.
Winneshiek Co. }

John Kavorek, and Jean Suchan, and Albert Jarosh, being first duly sworn, depose and say, each for himself, that he is the person named in, and who made and subscribed to the foregoing confession of judgment; that they have read the same and know the contents thereof, and that the same and statements therein contained are true.

JOHN KAVOREK,

JEAN SUCHAN,

ALBERT JAROSH.

“Subscribed in my presence and sworn to before me by Albert Jarosh, and John Kavorek, and Jean Suchan this 26th day of December, A. D. 1878.

O KALPER, *Notary Public*.”

Upon the judgment rendered on this *cognovit* an execution was issued and levied upon defendant's property. The defendant in his petition asks that the sheriff's sale of the property be restrained, and that the judgment by proper decree be canceled and declared void, for the reason that it was not authorized by the *cognovit*; that the *cognovit* itself was executed by him through mistake, and that he was induced to sign it by the false and fraudulent representations of the agent of the plaintiff Easton. The answer denies the allegations of the petition and avers that the *cognovit* was executed in the settlement of a suit brought, or about to be brought, by Easton against Kavorek and Suchan, and to obtain an extension of time upon the claim against them. The decree of the Circuit Court cancels and sets aside the judgment as against plaintiff,

Jarosh v. Easton.

on the ground that his signature to the *cognovit* was obtained by fraud.

II We think the evidence does not support the conclusion reached by the Circuit Court, that the *cognovit* was procured by fraud. It clearly appears that the instrument was signed by plaintiff in the absence of any representations made or inducements held out by Easton or any one acting for him. It may be true that plaintiff signed the paper under the mistaken belief that he was bound for the claim as a surety of the principal debtor. But Easton neither by himself, nor through an agent, had anything to do in creating such a belief in the minds of plaintiff. He was not led into the mistake by Easton. It appears that being a Bohemian he did not speak or understand the English language, and that communication was held with him through an interpreter. This interpreter was not the agent of Easton, and made no representations to him under the direction or with the knowledge of Easton. If this interpreter made any incorrect statements in regard to the business, Easton is not responsible for them.

III. We think, however, that the decree of the court below is right, for the reason that the *cognovit* does not authorize judgment to be entered against plaintiff, who signs it as surety, for the payment of the judgment to be rendered against Kavorek and Suchan. The instrument authorizes judgment against the principals only. There is not one word of authority for entry of judgment against plaintiff. It clearly appears to our minds that the plaintiff is only bound by the *cognovit* as a surety for the payment of the judgment. A careful reading of the instrument is all that is required to support our conclusion. Upon this ground the judgment of the Circuit Court will be affirmed. It will be understood that our decision does not preclude Easton from pursuing a remedy against plaintiff for the payment of the judgment.

MODIFIED AND AFFIRMED.

Oswego Starch Factory v. Lendrum.

OSWEGO STARCH FACTORY V. LENDRUM.

1. **Fraudulent Sale: ACTION TO RECOVER: DEMAND.** Where the vendor seeks to recover goods, after they have been attached as the property of the vendee, upon the ground that he was induced to deliver them through fraud, the gist of the action being the title to the property, it is not necessary, in order to maintain the action, to allege and prove a demand.
2. —: —: **RESCISSION OF CONTRACT OF SALE.** Where the vendor rescinded the sale of goods on account of the fraud of the vendee in inducing the sale and delivery, and brought an action to recover the goods, it was not required by law that notice of the rescission of the sale should be given before the action was commenced.
3. —: —: **CREDITORS: NOTICE OF FRAUD.** The vendor, after the attachment of the goods by the creditors of the vendee, has the right to rescind the sale for fraud perpetrated by the vendee, of which the creditors had no notice. An attaching creditor parts with no consideration, and acquires no greater rights to the property than the vendee had.
4. —: **ALLEGATIONS OF: RESCISSION OF SALE.** Allegations of fraud and fraudulent intentions considered. An intention on the part of the vendee not to pay for goods bought by him, which he conceals from the vendor, is a fraud which will authorize the vendor to rescind the sale.

Appeal from Polk Circuit Court.

TUESDAY, DECEMBER 20.

ACTION of replevin. There was a decision for defendant upon a demurrer to the petition. Plaintiff appeals.

A. B. & J. C. Cummins, for appellant.

Noorse & Kauffman, for appellee.

BECK, J.—I. The petition alleges that plaintiff shipped to Thompson & Reeves, pursuant to their orders, certain goods. The other material averments we present in the language of the pleader, as follows:

“That at the time said goods were so ordered, shipped and received, said Thompson & Reeves, as a firm, and as individuals, were, and had for a long time been, insolvent to their own

57	573
79	173
57	573
83	316
57	573
84	719
57	573
89	460
57	573
98	596
57	573
105	412
57	573
113	151
57	573
137	305

Oswego Starch Factory v. Lendrum.

knowledge; that they ordered and received the same, well knowing such insolvency and their inability to pay therefor; that they ordered and received the same with the intent not to pay therefor, and to cheat and defraud the plaintiff of the purchase price thereof.

"Plaintiff further states that said Thompson & Reeves concealed from it their insolvency and their inability to pay for said goods, and their intention not to pay for the same, and their intention to cheat and defraud the plaintiff of the purchase price thereof; and the plaintiff further states that, relying on the solvency and good faith of said Thompson & Reeves, and not knowing of their fraudulent intention, or of their insolvency, it sold said goods and shipped the same as hereinbefore stated.

"Plaintiff further states that after the writs of attachment, hereinafter mentioned, were levied upon the goods in controversy, but before the bringing of this suit, it elected to rescind said contract of sale, and without notice thereof, brings this suit.

"That it so elected to rescind the same as soon as it was informed of such fraudulent conduct and intention on the part of said Thompson & Reeves.

"Plaintiff further states that by reason of such fraudulent conduct and intent and said election to rescind, the plaintiff is the absolute and unqualified owner of said goods and merchandise.

"That the defendant wrongfully detains possession of said property from the plaintiffs at Des Moines, Polk county, Iowa, and that the same is of the value of one hundred and nineteen dollars; that said property was taken neither on the order or judgment of a court against the plaintiff, nor under an execution or attachment against it, or against said property.

"That the defendant, the sheriff of Polk county, took and detains the same on certain writs of attachment against the property of Thompson & Reeves; that said sheriff, having no

Oswego Starch Factory v. Lendrum.

knowledge of such fraud, levied on said goods and chattels under said writs of attachment as the property of said Thompson & Reeves; that he holds the same under a claim of absolute ownership in said Thompson & Reeves, and under a claim that the rights of the plaintiff, in said suits wherein the attachments were issued, who had no knowledge of said fraud, are paramount and superior to those of the plaintiff in said goods and chattels."

The demurrer to the petition is in the following language:

"1st. Said petition fails to show that any demand has ever been made upon defendant, or Thompson & Reeves, for said goods.

"2d. Said petition shows that plaintiff gave no notice of its election to rescind said contract of sale, either to defendant or Thompson & Reeves, or any other party, before the bringing of this suit.

"3d. The petition shows that plaintiff elected to rescind said contract of sale after defendant levied on said goods, and also shows that defendant and the attaching creditors had no knowledge of said alleged fraud, and said contract of sale cannot be rescinded after defendant's levy thereon, to the prejudice of attaching creditors.

"4th. Said petition fails to show or charge Thompson & Reeves with any false representations or fraudulent concealment of the facts or motives or intent charged in the petition, and fails to show that plaintiff had any right to rescind."

II. The questions arising in the case will be discussed in the order we find them presented in defendant's demurrer,

which, we think, accords with their logical sequence. The first question is this: Must a demand be alleged and proved in order to support the action? The petition alleges that the absolute and unqualified title of the goods is in plaintiff and thereon is based the right of possession of the property, for the recovery of which the action is brought. The alleged cause of detention of goods

1. FRAUDULENT SALE:
action to recover: demand.

Oswego Starch Factory v. Lendrum.

by defendant, as required by Code, section 3225, par. 5, is also shown. The defendant, it thus appears, seized the goods upon an attachment, claiming that they were the property of Thompson & Reeves. It therefore appears that no question of possession, disconnected from the ownership of the property, is in the case. The parties respectively claim the right to the possession of the property under conflicting and adverse titles. While the remedy sought is the possession of the goods, the gist of the action, so far as the rights of the parties are concerned, is the title to the property. Defendant's right to the possession is absolute and unqualified, if plaintiff is not the owner of the goods, and no act of the plaintiff's can defeat that right. We discover that the contention of the parties is not about the right of possession, disconnected from the title, but is about the title of the property. The question before us has been more than once ruled by this court. We have held that a demand is required only when it is necessary to terminate defendant's right of possession or confer such right on plaintiff, and that when both parties claim title and right of possession incident thereto no demand need be made *Smith v. McLean*, 24 Iowa, 322; *Jones v. Clark*, 37 Iowa, 586; *Redding v. Page*, 52 Iowa, 406; *Thurston v. Blanchard*, 22 Pick., 18; *Ayers v. Hewitt*, 19 Me., 231.

This rule is not questioned by defendant's counsel, but they urge that as the petition shows that plaintiff had not rescinded the sale when the suit was brought, defendant did not wrongfully seize the goods, and defendant could not know, without a demand, that plaintiff would not concede and recognize defendant's claim to the property. There might be something in this position, if the petition did not, as required by statute, set out defendant's claim to the property as based upon the title. The petition thus states both sides of the case and takes the place of an answer. (Of course all its averments may be denied in an answer.) The demurrer admits the averments of the petition, one of which is that defendant "holds" (present

Oswego Starch Factory v. Lendrum.

tense) the property under a claim based upon the absolute ownership of the goods in Thompson & Reeves. The defendant's counsel cannot deny in argument what they have admitted in their demurrer.

III. Does the law require plaintiff to allege and prove notice of rescission of the sale of the goods given before the
 2. —; —: action was commenced? It will be observed
 rescission of that the petition alleges the rescission of the con-
 contract of sale. tract of sale was on account of the fraud of the
 vendee in inducing plaintiff to enter into it, and that under the sale a delivery of the goods was made to the vendee.

Counsel for defendants cite no case which holds a notice to be necessary. We know of no principle of law which requires it. We know that such a rule would practically defeat the remedy the law secures to vendors, by recovering the property when the sale is induced by the fraud of the vendees. The thought is ludicrous that the rule should be applied to "lightning rod men," to the vendors of patent rights and patented articles, to those who travel over the State appointing agents for the sale of agricultural implements, "hog cholera cure," etc., etc., and to other like adventurers. They are usually far beyond the reach of notices, or become invisible immediately after perpetrating their frauds. It would be quite as wise to require a thief to be notified that a warrant will be issued for his arrest, as to require notice to swindlers before instituting proceedings to recover the property which they have acquired by their frauds. The language of the Illinois Supreme Court in *Johnson v. How*, 2 Gilman, 345, quoted in *Smith v. McLean*, *supra*, holding that a demand for the property is not required, is just as applicable to the case of notice. It is as follows:

"It could scarcely be insisted that if one to whom a horse had been loaned, instead of returning him according to contract, should attempt to run him from the country, and the first intelligence received by the owner should be, that he

Oswego Starch Factory v. Lendrum.

was actually absconding with his property, such owner would be bound, before he could properly procure a writ of replevin upon which to retake the same, to follow and overtake the wrong-doer, and formally demand his property."

If the vendee is not entitled to notice of the rescission of the contract, those claiming under him are not. They hold the property under the title of the vendee, and in cases where they are not innocent purchasers for value, they are entitled to no higher rights than the vendee. We shall soon discover that defendant and the plaintiffs in the attachment are not protected as innocent purchasers for value.

IV. Did plaintiff have authority to rescind the sale after the levy of the attachment? It is not denied that as against a —: —: the vendees he possessed such right before the attachment; but defendants' counsel insist that after the attachment no such power existed. The proposition of law which they maintain, may be stated in these words: The vendor after the attachment of the goods by the creditors could not rescind the sale for fraud perpetrated by the vendee, of which the creditors had no notice. It will be discovered that the point of contest involves the rights of an attaching creditor without notice.

The title of the property was not divested by the attachment, but remained in the vendees. The seizure conferred upon the creditors no right to the property as against plaintiff other or different from those held by the vendee. The sole effect of the seizure was to place the property in the custody of the law, to be held until the creditors' claims had been adjudicated and the property could be sold on execution. They parted with no consideration in making the attachment, and their condition as to their claims were in no respect changed. Their acts were induced by no representation or procurement originating with plaintiff which would in law or equity give them rights to the property as against plaintiff. Plaintiff's right to rescind the sale inhered in the contract and attached to the

Oswego Starch Factory v. Lendrum.

property. It could not be defeated except by a purchaser for value without notice of fraud. It is not important that we inquire as to the foundation of the rule favoring innocent purchasers. The facts upon which it is based are these: the payment of consideration for the property, and ignorance of the fraud. As we have seen, an attaching creditor has paid no consideration, and has not changed his condition relative to his claim by the attachment. He does not possess the same right held by an innocent purchaser under the rules recognized by the law.

Our position is simply this, that as an attaching creditor parts with no consideration, and does not change his position as to his claim, to his prejudice, he stands in the shoes of the vendee. It cannot be questioned that the right of rescission as between the vendor and vendee inheres in the contract and attaches to the property. The innocent purchaser for value occupies a different position, and his rights are, therefore, different. These views and conclusions find support in the following authorities: Drake on Attachment, section 246; Biglow on Fraud, page 311; Wells on Replevin, page 184, section 324; *Buffington v. Gerrish*, 15 Miss., 156; *Bussing v. Rice*, 2 Cush., 48; *Wiggins v. Day*, 9 Gray, 97; *Field v. Stearns*, 42 Vt., 106; *Fitzsimmons v. Joslin*, 21 Vt., 129; *Poor v. Woodburn*, 25 Vt., 234; *Jordan v. Parker*, 56 Me., 557; *Ayers v. Hewitt*, 19 Me., 281; *Bradley v. Obear*, 10 N. H., 477; *Farley v. Lincoln*, 51 N. H., 577; *Thompson v. Rose*, 16 Conn., 71; *Barnard v. Campbell*, 58 N. Y., 73; *Devoe v. Brandt*, 53 N. Y., 463; *Root v. French*, 13 Wend., 570; *Hitchcock v. Covell*, 20 Wend., 167; *Gasquet v. Johnson*, 2 La. Ann., 515-523; *Galbraith v. Davis*, 4 La. Ann., 95; *Bristol v. Willsmore*, 1 B. & C., 514; *Load v. Grun*, 15 M. & W., 216; *Johnson v. Peck*, 1 Wood & M., 336.

These cases all agree in holding that the creditors of a vendee, who, by fraud, induced the sale, cannot hold the property under proceedings to enforce their debts against the ven-

Oswego Starch Factory v. Lendrum.

dors. There is not, however, entire harmony in the reasoning of the different cases, or the grounds upon which the several decisions are based.

The main ground upon which defendants' counsel assail our conclusion is that the creditors are deprived of rights by defeating their attachment. They express the thought in this language: "The creditors, in reliance upon the possession and title of the vendee, had *exhausted their writ* and are now placed in the position where the successful assertion of the right to rescind will *take from them* a lawfully acquired security, upon the faith of which they rightfully relied in measuring the extent of their right of seizure of the debtor's property."

In speaking of the hardship imposed upon the creditors by the doctrine we adopt, they say: "They stand, therefore, as honest creditors, honestly trying, under the law, as we have said, by the only means in their power to secure their debt. They levy upon property, the title to which at the time of the levy thereon, is in the vendee. * * * * *

But, having levied upon this property thus owned by the vendee, they are obliged to cease their effort in the direction of the seizure of property. They must stop. No matter how much other property the defendant has, they can go no further. Their hands are tied."

Counsel in contemplating the rights and remedies of the creditors, forgot the rights of others. The levying of an attachment *per se* gives the creditors no rights to the property seized, and does not defeat the rights of lawful claimants thereto. If the property is not subject to the levy, they acquire no lien thereby. The argument of defendant's counsel, if sound, would lead to the conclusion that a creditor could hold the property of A, upon an attachment issued against B, for the simple reason that the creditor in good faith is using efforts to collect his debt, and believes the property seized belongs to B.

Oswego Starch Factory v. Lendrum.

V. Does the petition show such fraud as to authorize plaintiff to rescind the sale? The petition, it will be observed, alleges that Thompson & Reeves were insolvent, and unable to pay for the goods, of which they had full knowledge; that they ordered the goods with the intention not to pay for them, and to defraud plaintiff out of the price thereof; that they concealed from plaintiff their insolvency and fraudulent intention, and that plaintiff made the sale relying upon the good faith and solvency of the vendees, and in ignorance of their insolvency and fraudulent intentions. These allegations disclose the fraudulent animus of the vendees; that they concealed their intentions and their insolvency, and that the vendor was induced to sell the goods by reason of his belief of the solvency and good faith of the vendees. The solvency of the vendees was a material inducement to the sale. But the vendees were insolvent, and it is averred they concealed their insolvency. If it be held that this allegation implies not only their silence or omission to disclose their insolvency, but also acts or devices by which they hid their true condition from the observation of plaintiff, the petition, therefore, must be regarded as showing not only fraudulent intentions, but acts, concealments, done in pursuance thereof. Numerous cases hold that fraudulent concealment of facts pertaining to the inducements to the sale, authorizes its rescission. See *Donaldson v. Farwell*, 93 U. S., 631. Other cases to the same effect need not be here cited, as we do not understand that counsel for defendant dispute this doctrine. Their position on this point of the demurrer is that the petition does not aver any fraudulent act done by the vendee inducing the sale—that it charges fraudulent intentions without overt acts, and nothing more.

VI. But the petition distinctly avers an intention on the part of Thompson & Reeves not to pay for the goods purchased of plaintiff, and the concealment from plaintiff of such

4. —: alle-
gations of: re-
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sale.

Oswego Starch Factory v. Lendrum.

fraudulent intention. We are required to determine whether the facts thus alleged authorized plaintiff to rescind the sale.

While fraud rests in mere intention the law will give no relief against it, for, indeed, an unexecuted purpose to defraud another can work no injury. But when the purpose is carried out by acts, and injury results, the wrong-doer will be pursued by the most effective remedies. Now, an intention of the vendee not to pay for goods purchased is in morals a gross fraud, and when the goods are purchased with such an intention, the fraudulent purpose is accompanied by the act of purchase. The fraud no longer rests in unexecuted intention, it is actually perpetrated by the purchase.

The use of the words "purpose" and "intention" in this connection must not mislead to the conclusion that the fraud against which relief is sought has not been perpetrated. The purchase of the goods is the fraudulent act, and it is fraudulent because of the accompanying intention. It cannot be said that the law will not grant relief because the fraudulent character of the act is determined by the intention of the wrong-doer. Many acts are by the law deemed fraudulent only on the ground of the dishonest intentions accompanying them. Indeed, the purpose of the wrong-doer usually determines the character of the act. If it be dishonest, the act is fraudulent; if it be honest, the act is a mistake. The intention, therefore, must usually be sought for in cases of fraud.

A sale of goods in order to be valid between the parties must be a contract wherein the minds of the vendor and vendee meet. The vendor sells for a price to be paid by the vendee. The vendor understands that the vendee assents to pay the price. If the vendee fraudulently intends at the time of the sale not to pay for the goods, and conceals this intention from the vendor, the minds of the two do not meet. The vendor does not assent to the sale of the goods upon the conditions which are in the mind of the vendee.

Oswego Starch Factory v. Lendrum.

All sales of goods between honest men are accompanied by the understanding that the vendee will honestly pay for them, or will try to pay for them. The vendor is authorized to presume that such a purpose is entertained by the vendee, and this becomes a condition of the sale. If it be absent it is plain that the vendor does not give his assent to the transaction in the form it assumes under the fraudulent intention of the vendee.

The fact that the intention of the vendee, the virus which poisons the act, rests in his own breast, will not defeat the remedy which the law provides against the fraud. It may be shown by proof of its manifestations. These are usually the acts done by the wrong-doer, and the circumstances surrounding him and the transaction.

We conclude that an intention on the part of the vendee not to pay for goods bought by him, which he conceals from the vendor, is a fraud which authorizes the vendor to rescind the sale. This rule prevails in Massachusetts. *Wiggin v. Day*, 9 Gray, 97; *Dow v. Sanborn*, 3 Allen, 181; *Kline v. Baker*, 99 Mass., 253; *Rowley v. Bigelow*, 12 Pick., 309.

It is the law in New York. *Hennequin v. Taylor*, 24 N. Y., 139; *Ash v. Putnam*, 1 Hill, 302; *Bigelow v. Heaton*, 6 Hill, 44; *Byrd v. Hall*, 2 Keys, 647; *Johnson v. Monell*, 2 Keys, 655; *Hall v. Naylor*, 18 N. Y., 588; *King v. Phillips*, 8 Bosw., 603.

The doctrine is recognized in Connecticut, Maryland, Missouri, and Vermont. *Thompson v. Rose*, 16 Conn., 71 (81); *Powell v. Bradley*, 9 Gill & J., 220 (278); *Bidoult v. Wales*, 20 Mo., 546; *Fox v. Webster*, 46 Mo., 181; *Redington v. Roberts*, 25 Vt., 686 (694).

It has the support of the following English cases: *Bristol v. Willsmore*, 1 B. & C., 514; *Ferguson v. Carrington*, 9 B. & C., 59; *Kirby v. Wilson*, Ryan & M., 178; *Noble v. Adams*, 7 Staunt., 59. It is also announced in *Parker v. Byrnes*, 1 Lowell, 539, and in *Briggs v. Barry*, 2 Curtis, 259 (262).

Oswego Starch Factory v. Lendrum.

The rule is also followed in New Hampshire. See *Stewart v. Emerson*, 52 N. H., 301. It is claimed that the facts of this case do not necessarily require the application of the doctrine, and, therefore, all that is said by the court in its support is *dictum*. The opinion discusses the rule at great length, and reviews the authorities bearing upon the subject. The reasoning is cogent and exhaustive, and presents clear and direct support of the rule. The report should show very clearly that facts to which the doctrine is applicable are wanting, to warrant the conclusion that the protracted and able discussion of a court so respectable is made in support of a mere *dictum*. We ought rather to presume, unless the contrary clearly appears, that the question was really in the case, though the report does not clearly disclose it. We think, however, the opinion shows that the question involving the doctrine is in the case. The following quotation from the decision supports this conclusion: "The judge instructed the jury that the debt was created by the fraud of the defendant, if defendant by his acts or words prior to or at the time of the sales, intentionally induced plaintiff to believe that he intended to pay for the goods and defendant did not intend to pay, and the defendant induced this belief intending to deceive the plaintiff and induce him to sell the goods to defendant, and plaintiff was thereby deceived and was induced by this misrepresentation to make the sales, and would not have made them if defendant had not made this misrepresentation." See p. 311. The rule of the instruction stated by the court, in brief, is this: Representations by words or acts that the vendee intended to pay for the goods, when he did not intend to pay for them, whereby the vendor was induced to sell, is fraudulent. But the representations by the acts of the vendee, which under the rule would be fraudulent, would arise by the concealment of the fraudulent intention not to pay for the goods. This is clearly stated in the following quotation from the opinion, p. 322: "But who could obtain goods on credit

Oswego Starch Factory v. Lendrum.

with the unconcealed determination that they should not be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact [and] is not less material than a misrepresentation of ability to pay (*Bradley v. Obear*, 10 N. H., 477), and is an artifice intended and fitted to deceive. An application for an acceptance of credit by a purchaser is a representation of the existence of an intent to pay at a future time, and a representation of the non-existence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it fairly to be inferred from the act of the purchaser?"

We think it clearly appears that the question involving the doctrine under consideration was directly presented for decision in the case. There are, however, cases that are in conflict with the rule. See *Smith v. Smith*, 21 Pa. St., 367; *Backen-toss v. Spercher*, 31 Id., 324. *Cross v. Peters*, 1 Greenl., 343 is cited by counsel as being to the same effect. But we think it does not go so far. The doctrine of the case is that the purchase of goods by one who was insolvent but not aware of the fact, without artifice or false representations, is not fraudulent.

Bell v. Ellis, 33 Cal., 620, is relied upon by defendant's counsel as supporting his side of the case. But the point ruled in the case is that insolvency of a vendee, without an intention not to pay for goods bought and without false representations, will not avoid the sale. The case overrules the prior decision in *Sleigman v. Kolkman*, 8 Cal., 207. *Wilson v. White*, 80 N. C., 280, is also cited by defendant's counsel, but the point under consideration was not in the case. The Pennsylvania cases supported by *dicta* or statements *arguendo* found in the two cases last mentioned are the only authorities to which we have been referred which support the position of defendant's counsel. It is certainly true as we have shown, that the great weight of the authorities support the conclusion we have reached upon this branch of the case.

Austin v. Wilson.

We have in the foregoing discussion considered all questions arising in the case. It is our opinion that the judgment of the Circuit Court ought to be

REVERSED.

AUSTIN V. WILSON ET AL.

1. Practice: CASE REMANDED FOR JUDGMENT: MOTION FOR JUDGMENT.

Where a case is tried *de novo* in the Supreme Court, and is reversed and remanded for judgment without any other directions, judgment must be rendered as a matter of course and upon motion, unless the unsuccessful party shall bring himself within some recognized rule which would entitle him to a new trial.

Appeal from Winneshiek Circuit Court.

TUESDAY, DECEMBER 20.

THIS is an appeal from an order sustaining a motion for judgment. The action was brought to recover possession of certain real estate. The defendants set up an equitable defense, averring that the defendant, S. O. Wilson, purchased the premises of the plaintiff and took a bond for a deed; that a portion of the purchase-money had been paid and the balance tendered. The plaintiff took issue upon the sufficiency of the tender. The court below held it to be sufficient and rendered a decree for the defendants. Upon appeal this court held the tender to be insufficient and reversed the case. 50 Iowa, 207. A procedendo having been issued, the plaintiff filed a motion for judgment in his favor. The defendants resisted the motion upon the ground, as we understand them, that they were entitled to a new trial. The motion was sustained and the defendants appeal.

G. W. Adams and L. Bulis, for appellants.

Cooley, Fannon & Akers, for appellee.

57	586
96	749
57	586
115	23
57	586
134	526

Austin v. Wilson.

ADAMS, CH. J.—I. It was held in *Adams Co. v. B. & M. R. Co.*, 44 Iowa, 335, that the party that is successful in the appellate court, in an equitable action, is not necessarily entitled where the case is remanded to a judgment in the court below. The unsuccessful party may have a new trial upon a showing of newly discovered evidence, and possibly upon some other grounds. But where a case is tried *de novo* in this court and remanded for judgment without any other directions, judgment must be rendered as a matter of course, and upon motion, unless the unsuccessful party shall bring himself within some recognized rule which would entitle him to a new trial. Parties cannot be allowed to try their cases by piece meal, nor to experiment with the court. Whether if in this case the defendants had made an additional tender and asked leave to amend, setting up such fact, they could have been allowed to amend upon any showing of excuse for not having made sufficient tender in the outset, we do not determine. No such question is before us. The defendants in resistance to the plaintiff's motion for judgment filed written objections, and in them they state that they have tendered the amount due into court. If we were to conclude that the court should have taken notice of this statement we should be obliged to presume that the court found it untrue. We discover no error and the judgment must be

AFFIRMED.

THE STATE V. KREWSSEN.

587 588
87 36

1. **Criminal Law: DEFENSE OF ALIBI: BURDEN OF PROOF.** Where the defendant in a criminal trial relies upon the defense of an *alibi*, the burden of proof is upon him to establish such defense by a preponderance of the evidence. Following *The State v. Hamilton*, *post*.

Appeal from Davis District Court.

TUESDAY, DECEMBER 20.

THE defendant was indicted jointly with two others for burglary. Verdict and judgment having been rendered against him he appeals.

Miller & Son, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, CH. J.—The defendant introduced evidence tending to prove an *alibi*. The court gave an instruction in these words: “The burden of establishing an *alibi* is cast upon the defendant, and the evidence introduced to sustain it should outweigh the proof introduced by the State tending to show that the defendant participated in the burglary. But he is not bound to establish such defense beyond a reasonable doubt, and if upon the whole case, the testimony raises in your minds a reasonable doubt that the defendant was at the place of the burglary, and you find that said offense was not committed by the counsel, advice, or direction of the defendant, then you should find the defendant not guilty.”

The defendant objects to so much of the instruction as charges the jury that the evidence of the *alibi* should outweigh the evidence tending to show that the defendant participated in the burglary.

Under the rule adopted by a majority of the court in *State*

 Dee v. Downs.

v. Hamilton, post, p. 596, decided at the present term, the instruction must be approved.

We discover no error upon any other point, and the judgment must be

AFFIRMED.

57	539
131	325

 DEE V. DOWNS.

1. Statute of Frauds: AGREEMENT TO EXECUTE A NOTE AS SURETY.

Where one agreed to execute a note as surety for another, such an agreement is a promise to answer for the debt or default of that other, and is within the statute of frauds, unless the agreement is in writing.

Appeal from Louisa Circuit Court.

TUESDAY, DECEMBER 20.

ACTION to recover of the defendant the amount of a certain promissory note which, it is alleged, he agreed to execute with C. W. Downs and Charles Downs for money loaned to the defendant and said other parties. The defendant denied that he made any agreement that he would execute the note, and averred that plaintiff ought not to recover because he claims under a verbal promise to pay the debt of another.

In an amendment to the answer it is averred that defendant received no advantage from said contract—that no money was loaned to him or on his credit.

There was a trial by jury and a verdict and judgment for the plaintiff. Defendant appeals.

J. & S. K. Tracey and *Charles Baldwin*, for appellant.

John C. Power, for appellee.

ROTHROCK, J.—This cause has already been in this court upon an appeal by the plaintiff, and the judgment was reversed because the court excluded evidence that the loan was made to the defendant and to C. W. Downs and Charles

Dee v. Downs.

Downs. This was upon the theory that if the loan was in fact made to Isaiah Downs, as well as the other defendants he was liable upon an agreement that he would execute the note.

Upon the last trial, however, the evidence tended strongly to show that the fact was, as alleged by the defendant, that he received no advantage from the contract of loan, and that no money was loaned to him. Indeed, the whole scope of the evidence is to the effect that the loan was made to C. W. Downs as principal, and if the defendant had executed the note he would have been a mere surety for C. W. Downs.

The defendant requested the court to instruct the jury to the effect that, in order to find the defendant liable, they must find from the evidence that the loan was in fact made to him as well as to the other parties named. These instructions were refused. Other instructions were given to the effect that the defendant was liable if he agreed to execute the note, and the question as to an agreement to execute it as surety appears to have been ignored.

We have no doubt that where one agrees to execute a note as surety for another, such an agreement is a promise to answer for the debt of that other, and is within the statute of frauds, unless the agreement is in writing. It is as plain a promise to answer for the debt of another as can well be made. See *Brown on the Statute of Frauds*, Secs. 174 and 183, and cases cited.

What is said in *Van Riper v. Baker*, 44 Iowa, 450, as to the views or impressions of a majority of the court upon the validity of a verbal promise, by the party sought to be charged in that case, was upon the theory that his promise was an original undertaking, and not merely an agreement or promise that he would become surety for another, and the thought was based not upon what was denominated the finding of facts in the case, but upon that part of the evidence which appeared in the record.

REVERSED.

1. STATUTE of
frauds: agree-
ment to exe-
cute a note as
surety.

KNAPP V. HOYT ET AL.

1. **Bankruptcy: NEW PROMISE TO PAY DEBT: DISCHARGE.** Where a bankrupt, after the adjudication of bankruptcy and before his discharge, makes an express new promise to pay an original debt, such promise will be binding upon him after his discharge.
2. —: —: **EVIDENCE: DISCHARGE IN BANKRUPTCY.** A bankrupt prior to his discharge said to a creditor that "if he got his discharge he would be in shape to pay, and would pay" a certain debt. *Held*, that this constituted an express promise to pay, and took the debt out of the discharge in bankruptcy.
3. —: —: **DEBT IN JUDGMENT: DISCHARGE: EQUITY.** Where the debt is already in judgment, and the party needs only the removal of the apparent discharge of it arising from the bankruptcy proceedings, the relief is of equitable cognizance.

Appeal from Floyd Circuit Court.

TUESDAY, DECEMBER 20.

THE plaintiff alleges in his petition that in 1871 and 1872 he was engaged in business with Z. C. Trask *et al.*, forming the firm of Trask, McNitt & Knapp, and on September 10, 1872, defendant J. M. Dougan recovered a judgment against said firm and the plaintiff for \$318.87; that on August 7, 1872, a petition was filed against the plaintiff as a bankrupt, and on the 28th day of April, 1873, plaintiff received a discharge in bankruptcy from all debts and claims which existed on August 7, 1872, whereby defendant's judgment became extinguished and plaintiff released from all liability thereon; yet said judgment remains unsatisfied and not released of record, and causes a cloud on plaintiff's title, and defendant claims that plaintiff is still held thereon. Plaintiff asks that said judgment may be decreed discharged and of no force against plaintiff or lien on his lands. The defendant Dougan answered, alleging that he had no knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations, and by way of counter-claim stating that said judgment

Knapp v. Hoyt.

was rendered September 9, 1872, and on the fifteenth day of May, 1875, and on divers other days and times since the filing of the petition to adjudge the plaintiff a bankrupt, under which his discharge was obtained, in consideration of defendant's said judgment and demand, plaintiff verbally promised defendant that he would pay said judgment in a reasonable time, and by reason of said promises and agreements the plaintiff waived the bar of his discharge as to said judgment of defendant. Defendant asks that said judgment debt be revived against plaintiff and confirmed as valid and binding. The court dismissed the defendant's cross petition, and decreed that defendant's judgment be released and discharged, and be of no force against plaintiff, or lien upon his property. The defendants appeal.

Wilber & Sherwin, for appellants.

Goodykoon'tz, Blythe & Wheeler and *P. W. Burr*, for appellee.

DAY, J.—The plaintiff introduced his discharge in bankruptcy in the usual form, dated April 28, 1875, and purporting to discharge him from all debts provable in bankruptcy previous to his being adjudged a bankrupt on a petition filed against him August 7, 1872. The defendant introduced the judgment docket of the Floyd Circuit Court showing the rendition of a judgment in favor of J. M. Dongan against Z. C. Trask, E. W. McNitt, and James C. Knapp, dated September 10, 1872, for \$780.27, and costs and attorney's fees, upon which judgment \$273.05 had been collected on execution. The testimony respecting the promise of plaintiff to pay this judgment is very brief, and is, substantially, as follows: J. M. Dongan testified: "I had a conversation with plaintiff about the 26th of April, 1875. We were talking about our business, when he said to me that he was going to Dubuque the next day and expected to get his discharge. That he couldn't do

Knapp v. Hoyt.

anything at that time about fixing his matter with me—paying me. We were talking about the Trask, McNitt & Knapp judgment. He said if he got his discharge, which he expected to, he would be in shape to pay it, and was going to pay me. That he had enough to do it with. * * * In the forepart of the month of May, and after obtaining his discharge, I was * * talking with him about this same matter, and he said he was going to pay that as soon as he got around to it. That he expected to get around in a short time, and he would be in shape to fix it up. Afterward, about the 7th of June, 1875, I took Mr. Goodykoontz with me and went down expecting to get it straightened up at that time. He claimed that he was going to pay me, but didn't come to a conclusion that night. The last was that he wanted to see Trask; that he thought Trask should stand a share, and wanted to see what he could do with him."

Mr. Goodykoontz testified: "About May 5th I was present at a conversation between defendant Dougan and plaintiff, in plaintiff's place of business, at Nora Springs. In that conversation Dougan said to Knapp that he had come down to talk with him in reference to his claim against Trask, McNitt & Knapp; that the matter had been running some time, and he desired to have it arranged some way. Knapp replied that he was going to make the matter right, and didn't want to see Dougan lose anything."

R. Wilber testified: "I called on plaintiff, at his place of business, a few days before he was going to Dubuque. I asked Knapp what he was going to do with Dougan. He said he proposed to fix it up. I asked him to give security for the claim. He said, 'no, I won't do that; I can't do it—you know I can't before I get my discharge.' * * * I think he said he couldn't get a discharge by giving that security, but after he got his discharge he would fix Dougan's matter up."

The plaintiff, on his own behalf, testified as follows: "I have never, since April 28, 1875, at any time or place, agreed

 Knapp v. Hoyt.

or promised to pay defendant, or any person for him, any part of the judgment in controversy. All the conversation I have had with him since April 28, 1875, was that he frequently asked me to fix the matter up, and I universally told him that when I got able I would do what was right in regard to a portion of it. I have no remembrance of any conversation with defendant in the presence of anyone since I returned from Dubuque, when I got my discharge."

I. The plaintiff concedes, at least by implication, that after a debtor has been fully discharged from his debts in a proceeding in bankruptcy, he may, by a new promise to pay the original debt, if clear, distinct, and unequivocal, become liable therefor in an action at law, on the new promise. It is claimed, however, that a promise made before final discharge is without consideration and void. The very decided weight of authority, however, holds that a promise made after the debtor has been adjudicated a bankrupt, but before he has obtained his certificate of discharge, is binding. This doctrine is sustained by the following authorities: *Brix v. Braham*, 1 Bing., 281; *Stilwell v. Coope*, 4 Denio, 225; *Corliss v. Shepherd*, 28 Maine, 550; *Otis v. Gazlin*, 31 Maine, 567; *Donnell v. Swaim*, 2 Penn. L. J., 393; *Fraley v. Kelley*, 67 N. O., 78; *Hornthal v. McRae*, Id., 21. The contrary doctrine is held by the following authorities only, so far as we have been able to discover: *Ingersoll v. Rhodes*, Hill & Denio, Supp., 371; *Ogden v. Ridd*, 13 Bush., 581. The case of *Stibbin v. Sherman*, 5 Sandf., 510, although cited in Bump's Law of Bankruptcy as sustaining the opposite doctrine, does not, in fact, support it, as it did not appear in that case that the new promise was made after the debtor had been adjudicated a bankrupt. Whatever promise was made by the plaintiff, before obtaining his certificate of discharge, was made on the 26th day of April, 1875. The plaintiff obtained his discharge on the 28th day of April. Where debts have been proved and assets have come

1. BANK-
RUPTCY:
new promise
to pay debt:
discharge.

Knapp v. Hoyt.

to the hands of the assignee, the publication for discharge cannot be made until after the expiration of six months from the adjudication. If no debts have been proved, or no assets have come to the hands of the assignee, the application for a discharge may be made at any time after the expiration of sixty days from the adjudication of bankruptcy. The discharge of the plaintiff on the 28th of April is conclusive proof of the fact that he had been adjudicated a bankrupt before the 26th of that month. We are of the opinion that a promise upon the 26th of April, as well as after the obtaining of his final discharge, is binding upon the plaintiff if sufficiently established.

II. The appellee insists that the evidence does not establish a clear, distinct, and unequivocal promise to pay the debt, either before or after the discharge. On behalf of the defendants, Dougan testified that in the conversation on the 26th of April the plaintiff said: "That he couldn't do anything at that time about fixing his matter with me—paying me. He said if he got his discharge, which he expected to, he would be in shape to pay it, and was going to pay me. That he had enough to do it with." The plaintiff, although a witness upon the trial, does not deny that he promised to pay the debt before he received his certificate of discharge. In *Stilwell v. Coops*, 4 Denio, 225, the plaintiff proved a conversation between himself and the defendant, before the defendant obtained his discharge, in which he said that "the note should be settled." It was held that this was a promise to pay the note, and that it saved the debt from the operation of the discharge. In *Evans v. Carey*, 29 Ala., 99, the defendant said: "If plaintiff had anything on account of such indorsement, he (defendant) was able and willing to pay it to plaintiff." It was held that this amounted to an express promise to pay and took the debt out of the discharge in bankruptcy. See, also, *Bennett v. Everett*, 3 R. I., 152; *Haris v. Peck*, 1 R. I., 262. The plaintiff in this case said that if he

The State v. Hamilton.

got his discharge "he would be in shape to pay, and was going to pay." This, we think, constitutes an express promise to pay. The court erred in decreeing that the defendant's judgment be released and discharged, and of no force and effect against plaintiff.

III. The defendant, by way of counter-claim, asked that his judgment debt be revived against the plaintiff and confirmed as valid and binding, and that he recover said amount and have execution therefor. It is claimed that the counter-claim cannot be maintained, because the defendant's remedy is at law upon the original debt and the new promise combined, citing *Dusenberry v Hoyt*, 53 N. Y., 521. The defendant's debt is, however, already in judgment, and all that the defendant needs is the removal of the apparent discharge of it, arising from the bankruptcy proceedings. This he can obtain by showing the new promise to pay the judgment, and the relief which he asks is of equitable cognizance. Upon the evidence introduced the defendant is entitled to a decree confirming the judgment as valid and binding against the plaintiff, and that execution may issue thereon.

REVERSED.

THE STATE V. HAMILTON.

1. **Criminal Law: AMENDMENT OF ABSTRACT: PRACTICE.** After the final submission of a criminal cause the defendant filed a motion for leave to amend his abstract, but made no showing therefor, and did not ask to set aside the submission. *Held*, that the amendment could not be allowed.
2. —: **DEGREE OF PROOF: JURY: REASONABLE DOUBT.** While a juror who entertains a reasonable doubt of the defendant's guilt is not required to surrender his convictions, because the other jurors have no such doubt, yet the refusal to so instruct, where the court gave the usual instructions in regard to the degree of proof required, was not error.

57	596
81	42
57	596
82	615
57	596
84	86
57	596
111	710
57	596
113	697
57	596
124	413
57	596
137	593

The State v. Hamilton.

3. —: ALIBI: BURDEN OF PROOF. It is now the settled law of this State that where, in a criminal case, the defense of an *alibi* is relied upon, the burden of proof is on the defendant to establish such defense by a preponderance of the evidence.
4. —: —: ADAMS, J., *dissenting, held*, that if the evidence to establish an *alibi* was such as to raise a reasonable doubt of the defendant's guilt, the jury would be justified in acquitting. DAY, J., *concurring*.

Appeal from Des Moines Circuit Court.

TUESDAY, DECEMBER 20. :

THE defendant was tried and convicted of the crime of robbery, and he appeals.

J. M. Virgin, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. Before the submission of this cause the attorney-general filed a motion to strike out all that part of the transcript and abstract purporting to be the evidence, interrogatories and rulings of the court, and interlocutory questions, upon the ground that there is no certificate nor bill of exceptions signed by the judge of the District Court making the evidence and said proceedings of record. An examination was made of the transcript and abstract, and the motion being well taken was sustained. The cause was thereupon finally and fully submitted. Afterward the defendant filed a motion for leave to file an amendment to his abstract within thirty days. No motion was made to set aside the submission of the cause. The attorney-general resisted the motion to amend upon the ground that the submission had not been set aside, and because no showing was made for leave to amend. The cause comes to us in this condition.

We do not think the application to amend is sufficient. It is not claimed that any bill of exceptions was at any time signed by the trial judge, and filed in the case, nor that any

The State v. Hamilton.

certificate of the judge to what purports to be evidence was ever appended thereto. We have what purports to be a complete transcript of the record in the court below, and as it appears to us, no amendment of the abstract can be made which will make the evidence available here, because the transcript does not justify such an amendment.

II. It is claimed that a motion for a continuance should have been sustained. It does not appear to us that there was any abuse of the discretion of the court in overruling the motion. It might appear otherwise if the evidence upon which the case was tried was of record.

III. The defendant asked the court to instruct the jury in substance, that if any juror entertained a reasonable doubt of defendant's guilt he was not required to surrender his convictions because other jurors entertained no such doubts. The instruction was refused and the court gave the usual instructions upon the degree of proof required to convict. Substantially the same instruction was asked in *State v. Rorabacker*, 19 Iowa, 154, and the refusal to give it was approved by this court. Of course each juror is to act upon his own judgment. He is not required to surrender his convictions unless convinced. He may be aided by his fellow jurors in arriving at the truth, but he is not to find a verdict against his judgment merely because the others entertain views different from his own. But a jury need not be advised of so simple a proposition. The usual method of instructing upon the measure of proof required in criminal cases is sufficient.

IV. The defendant claimed that he was at another place when the robbery was committed. The court instructed the jury that the burden of proof was on the defendant to establish the fact that he was not present, by a preponderance of evidence. This instruction was correct and is now the settled law of the State. *State v. Vincent*, 24 Iowa, 570; *State v. Hardin & Henry*, 46 Id., 623; *State v.*

2. — : degree of proof:
jury : reasonable doubt.

3. — : all-bl : burden of proof.

The State v. Hamilton.

Red, 53 Id., 69; *State v. Kline*, 54 Id., 183; *State v. Northrup*, 48 Iowa, 583. We find no error in the record.

AFFIRMED.

ADAMS, CH. J., *dissenting*.—In my opinion, if the evidence introduced to show that the defendant was at another place 4 —: —: when the robbery was committed, was such as to raise a reasonable doubt of his guilt, the jury would have been justified in acquitting. Code, § 4428. Now it is manifest that such doubt might be raised by evidence which could not be said to preponderate over the evidence leading to a different conclusion. This court has never undertaken to abrogate the rule that a reasonable doubt of guilt justifies an acquittal. It has, indeed, recognized this rule in the very cases relied upon by the majority as holding that when the defendant relies upon proving an *alibi* he must prove it by a preponderance of evidence. Both rules cannot be correct because they are inconsistent with each other. No jury can follow both. Let us suppose a case where the evidence of an *alibi* does not preponderate, but does raise a reasonable doubt of guilt. What shall a jury do? If they follow the instruction that the evidence of an *alibi* must preponderate they must convict and disobey the instruction as to reasonable doubt. On the other hand, if they follow the instruction as to reasonable doubt they must acquit and disobey the instruction as to the evidence of an *alibi*. I cannot regard the rule adopted by the majority as to evidence of an *alibi* as being the established doctrine of this court, so long as it is inconsistent with another rule to which the court still adheres. If the court adopts the rule in question as to an *alibi*, then to be consistent it should modify the rule as to reasonable doubt. The rule as modified would be as follows: A reasonable doubt of guilt is sufficient to justify an acquittal, unless it is raised by evidence of an *alibi*, and if it is, then it is not sufficient.

The State v. Hamilton.

But the rule adopted as to *alibi* appears to me to be wrong for another and still more cogent reason. In a civil action it is sufficient for the defendant to establish his defense by evidence which *balances* that of the plaintiff. According to the rule in question adopted by the majority, the defendant in a criminal action must prove his innocence by evidence which *overbalances* the evidence introduced to prove his guilt if the evidence of his innocence simply is that he was where he could not have committed the crime. The adoption of the rule in question requires a modification of the rule as to the presumption of innocence. The true doctrine under such rule would seem to be that the evidence of guilt is aided by a presumption of guilt, if the evidence of innocence relied upon is the evidence of an *alibi*.

The majority, it appears to me, have been misled by reason of the fact that there is generally a well grounded suspicion attached to evidence of an *alibi*. It often comes from such sources that it should be greatly distrusted. The most direct and positive testimony may often very properly be regarded as entitled to but little if any weight. But to the extent that it does have weight, it should have the same effect which any other evidence of equal weight has. If it has weight enough to balance the evidence of guilt it should certainly be sufficient. And I think it should be sufficient if it raises a reasonable doubt. The views which I have expressed are supported by *French v. State*, 12 Ind., 670, where the question is very ably considered and the authorities reviewed. It is not to be denied that the rule now adopted by the majority finds some support in *dicta* which have crept into opinions in one or more cases in this court, and from implications arising from rulings in other cases; but we have never been asked before to go quite as far as we are asked to go now. An examination of the cases in which the *dicta* and implications are found will show that there has always been a minority unprepared to adopt the rule now adopted. In my opin-

Ferguson v. Davis County.

ion the instruction cannot properly be approved, and I am authorized to say that Mr. Justice Day concurs with me in this view.

FERGUSON V. DAVIS COUNTY.

1. **Board of Supervisors: CLAIM FOR UNLIQUIDATED DAMAGES: PROOF.**

The presentation of a claim for unliquidated damages against a county, to the board of supervisors, and demand for payment, may be proved by the person presenting it.

2. **County Bridges: EXPERT TESTIMONY.** The evidence of an expert, a bridge-builder, as to the average length of time white-oak timber would last in a bridge was properly admitted. Such facts should not be left to be inferred by the jury without proof.3. **Evidence: EXPERT: COMPETENCY OF WITNESS.** It is not necessary that a person be a medical expert before he can testify that his ribs were fractured. Any person who knows a fact may testify in regard to it.4. ———: **DECLARATIONS OF PERSON INJURED.** In an action for personal injuries the declarations of the person injured, made after convalescence, as to the condition of his health and the pain he experienced, are not admissible.5. **County Bridges: ADOPTION OF PLAN: NEGLIGENCE.** A county cannot carelessly and negligently adopt an insufficient plan for a bridge, and escape liability for damages resulting from the insufficiency of the plan. The county should exercise reasonable care in the adoption of a plan for a public bridge.6. **Compensatory Damages: MENTAL SUFFERING.** In an action for personal injuries mental suffering, arising from actual physical injury inflicted, may properly be considered in estimating compensatory damages.7. **Bridges: DEFECTIVE: NOTICE: LIABILITY.** Where a county was not negligent in the construction of a bridge, it will not be liable for an injury resulting from the same becoming defective and out of repair, unless it had notice or knowledge thereof, or unless the defect was so notorious that not to know of it was negligence.8. ———: ———: **FAILURE TO REPAIR.** Where the county had knowledge, or, in the exercise of reasonable prudence, had reason to know that a bridge was defective, and failed to repair it, or to prevent the public from using it, it is liable for any injury resulting therefrom.

57	601
80	226
80	354
57	601
88	621
57	601
92	646
57	601
99	593
57	601
d107	620
57	601
109	449
57	601
e126	626
126	627
57	601
f132	735
f133	653
57	601
e135	274
57	601
f139	16

Ferguson v. Davis County.

9. ———: INSPECTION OF: NEGLIGENCE. The failure of the board of supervisors to inspect bridges, or to appoint some competent person to do so, as frequently as men of ordinary prudence would deem necessary, was negligence that would render the county liable for any injury caused by a defective bridge.
10. ———: BOARD OF SUPERVISORS: NOTICE OF DEFECT. Where the board of supervisors had been informed of the dangerous condition of the bridge, and had failed to examine or repair it, it was negligence although the bridge had been examined two and one-half years before, and reported reasonably safe for about four years.
11. ———: ———: KNOWLEDGE OF DEFECT. The facts that the bridge had been out of repair for seven or eight months, and was old, and that the county took no measures to examine or repair it, will not constitute negligence, unless some member of the board knew, or had reason to know, that it was unsafe.

Appeal from Davis District Court.

TUESDAY, DECEMBER 20.

THIS is an action to recover damages for injuries sustained by the falling of a portion of a county bridge of defendant, over which the plaintiff was passing. There was a jury trial, resulting in a verdict for plaintiff for \$2,000. The defendant appeals. The material facts are stated in the opinion.

Payne & Eichelberger, for appellant.

Trimble, Carruthers & Trimble and M. H. Jones & Son, for appellee.

DAX, J.—The bridge in question was constructed by Davis county over Fox River, in 1863. The bridge was built entirely of oak timber, and was constructed of a span of about forty feet, with an apron on each side about fourteen feet wide, and was about sixteen feet above the bed of the stream. The accident of which the plaintiff complains occurred on the 10th day of June, 1875. At that time the timbers of the bridge were badly rotted. As the plaintiff was crossing over the bridge in a funeral procession, in a two-horse wagon, in which

Ferguson v. Davis County.

were five persons besides himself, a joist-beam broke off at both ends, leaving about twenty-four feet of joist and floor without support, and precipitating the team and wagon, and the persons therein, to the ground beneath, a distance of about sixteen feet, whereby the plaintiff sustained injuries for which he sues.

I. This action was commenced on the 3d day of February, 1876. At the September term, 1875, of the board of super-

1. BOARD of
supervisors:
claim for un-
liquidated
damages:
proof.

visors, M. H. Jones, one of the attorneys of the plaintiff, presented plaintiff's claim for damages, and asked the board to act upon it. It is insisted

by the appellant that the testimony of Jones is incompetent to prove the presentation of the claim, and that the presentation, filing, and action of the board on the claim must be made of record. We are clearly of opinion that the presentation of the claim may be proved by the testimony of the person who presented it. The board could not defeat the claim by refusing or neglecting to make any record of its presentation. Section 2610 of the Code simply provides that no action shall be brought against a county on an unliquidated demand until the same has been presented to the board of supervisors and payment demanded. It is not required as a condition precedent to the bringing of an action that the board shall act upon the claim. The board, by refusing to act or to make any record of their action, cannot deprive a party of the right to maintain an action. All that the party needs to do is to present his claim, and give the board a reasonable time to act. See *White v. Polk County*, 17 Iowa, 413. The plaintiff in this action gave the board from September to the following February, which certainly was a reasonable time. If the defendant acted upon and allowed the claim, it is a very easy matter for it to show that fact in defense. It is idle, however, to claim that the board may have allowed the demand, in view of the defense which the county is making. In our opinion the proof of the presentation of the claim, and demand of

Ferguson v. Davis County.

payment, is sufficient to authorize the maintenance of this action.

II. One S. C. Bradley, who was a bridge-builder, and had considerable experience with white-oak timber, was introduced as a witness by plaintiff, and asked the following question: "Will you state about what would be the average life of timber—white-oak timber—in a bridge?" The defendant objected to this question as not a question for an expert, but a matter of common observation. The objection was overruled. The witness answered as follows: "The age runs from seven to twelve years, but as a general thing they become unsafe at eight or nine years. Some timbers will last twenty years, while others would not last more than five or six years." The action of the court in admitting this testimony is assigned as error. It is claimed that the life of timber is a matter of common observation, and that any farmer can give as good a guess on this question as a bridge-builder, carpenter, or any one else. It must be admitted, however, that the life of white-oak timber in a bridge is a matter which does not come under the observation of every one. And if it should even be conceded that farmers possess as much knowledge upon the question as a bridge-builder or carpenter, still there is no proof that the jury in this case was composed wholly or even partially of farmers. Conceding that the knowledge is such as may be acquired by observation, yet the matter is one which all persons do not have the inclination nor the opportunity to observe. It cannot be doubted that upon almost every jury impaneled there would be likely to be persons as ignorant respecting it as with regard to the most intricate questions of skill and science. The fact must be established by the testimony of persons who have acquired knowledge respecting it by experience or observation, and cannot be left to be inferred by the jury without proof.

III. The plaintiff was introduced as a witness, and amongst

Ferguson v. Davis County.

other things, testified as follows: "Do you know, or did you ascertain what the trouble was with your ribs?"

3. EVIDENCE:
expert: com-
petency of
witness.

"I did." "What was it?" The defendant objected to this question because it calls for hearsay, and is incompetent, because the witness is not an expert. The objection was overruled, and the witness answered: "My ribs were fractured." This action of the court is assigned as error. It is apparent that a fracture of the ribs may be of such unmistakable a character that the person having sustained the injury may have positive knowledge of the fact. In such case he does not give an opinion as an expert, but states simply a fact. Any one who knows a fact may testify in regard to it. It is not necessary that a witness should be an expert before he can be allowed to testify that his ribs were fractured. If his conclusions are not based upon sufficient knowledge, that may be shown upon cross-examination. Surely a witness, without being an expert, may testify that his arm or his leg was broken, and he may have as satisfactory knowledge of the fracture of a rib.

IV. The accident to the plaintiff happened on the 10th day of June, 1875. The plaintiff remained in bed from fifteen to eighteen days. In about twenty days he was able to get around on crutches. Between the eighteenth and thirtieth of July he drove the mower in harvest. In September he commenced hauling wood to town, but he did not make a hand to go to work, and do a full day's work until the spring of 1876, when he went to farming, plowing and planting. This action was commenced in February, 1876. It was tried in 1878, and reversed at the June term, 1879. See 51 Iowa, 220. It became a very material question affecting the measure of damages, as to the extent and permanency of the plaintiff's injury. Henry Ferguson, the plaintiff's brother, was introduced as a witness, and testified as follows: "Had been acquainted with my brother, Frank, all his life; lived at father's house with him; waited on

4. ———: de-
claration of
person in-
jured.

Ferguson v. Davis County.

him after the accident; whilst bed fast he complained of his back, foot, and head; he was active and quick before he was hurt, and could stand hard work better than I could; never sick before that, except once with chills, ten years before; has not been so active since; he remained at home two years after the accident before he moved to himself; during these two years he was not active, compared with what he was before; didn't work as much; knew of his getting down again, or being stopped from work and confined to the house in the fall of 1876, the day before the election; was helping me ceil the cellar and got down; had fever." The witness was then asked the following question: "State whether he made any complaint while he was suffering at that time." The defendant objected to this question because incompetent and immaterial. The objection was overruled, and the witness answered: "He complained of his back."

John E. Ferguson was introduced as a witness, and amongst other things, testified as follows: "Plaintiff's health was good until the accident; he was active and able to work hard; not so active since; have been where he was in bed at times since the accident, and he had fever; he generally complained of his back; the spells would last from four days to a week or longer, and he would then be able to go to work again; he would do a hard day's work, and the next day be unable to do anything, have worked with him since in harvest-field; there were three or four times he would quit work." The witness was then asked the following question: "State why he quit, judging from what he said." This was objected to as incompetent. The objection was overruled, and the witness answered: "He would say he would have to quit and rest awhile; that his back was hurting him, so that he could not sit up straight; this was in 1876 and 1878."

Wesley McMains, a witness on behalf of the defendant, was asked, upon cross-examination, the following question: "Do you recollect plaintiff's stopping to rest whilst at work, and

Ferguson v. Davis County.

saying that he must quit and rest on account of his back hurting." The defendant objected because not proper cross-examination, and incompetent, and hearsay. The objection was overruled, and the witness answered: "Recollect of his complaining to me at one time, whilst at work, of his back hurting him, and he said he would have to quit and rest."

The defendant assigns these several answers as error, and insists that the statements admitted are self serving declarations, made after convalescence, and that they are, therefore, inadmissible. The plaintiff insists that the declarations are the immediate accompaniment of acts, which they tend to explain, and that they are admissible as part of the *res gestæ*. A majority of the court think the declarations inadmissible under the doctrine announced in Wharton's Evidence, sections 268, 1100 and 1101, and the cases therein cited. A minority of the court regard the declarations as admissible under Wharton's Evidence, section 1102, and 1 Greenleaf on Evidence, Sec. 108, and authorities cited.

V. O. S. Willey, a civil engineer, made the plan for the bridge. The plan provides for a tenon on the queen posts entering a mortise in the cross tie. No provision was made for the escape of water from the mortise. The evidence tends to show that it is difficult to keep the water out of a mortise constructed in that way, that the timber shrinks and swells, and at times the water gets in and lessens its durability. It was at the point where these tenons entered one of the cross-ties, that it gave way. There was evidence that the cross-tie was so rotten it would crumble to pieces in the fingers, there being a shell around it from half an inch to an inch thick. Respecting the plan of the bridge the defendant asked the court to instruct as follows: "The county is not liable in this case for injuries resulting from a defective plan of the bridge, if it was defective" The court refused this instruction, and instructed the jury as

A. COUNTY
bridges:
adoption of
plan: negli-
gence.

Ferguson v. Davis County.

follows: "In the erection of county bridges it is the duty of the county to exercise ordinary and reasonable skill and care in adopting a plan, as well as in the construction of the bridge; and if you find that the defendant employed a competent and skillful engineer to prepare and draft the plan of the bridge in question, and that he did so, and recommended it as sufficient for that purpose, and the county authorities, in good faith believing it to be sufficiently strong and safe for the purpose designed, adopted it, then this would be the exercise of care and skill with reference to the plan, even though the engineer erred in his judgment with reference thereto." The instruction asked exonerates the defendant absolutely from all liability on account of the defective plan of the bridge, if it was defective. The instruction given simply holds the defendant to the exercise of reasonable skill and care in adopting a plan. The instruction given, we think, announces the correct rule. In our opinion a county cannot negligently and carelessly adopt an unsafe and insufficient plan for a bridge, on account of its cheapness, and be allowed to escape all liability for damages resulting from the insufficiency of the plan. The county should at least exercise reasonable care in the adoption of a plan. It is urged by appellant that the adoption of a plan for a bridge is a mere judicial act, and that no liability attaches for the adoption of an insufficient or improper plan. The same point was made in *Van Pelt v. The City of Davenport*, 42 Iowa, 308, which was an action to recover damages resulting from an alleged insufficient sewer. We held, however, that it was the duty of the city to exercise reasonable care, judgment, and skill to make the culvert of sufficient capacity to carry away the accumulated water without injury to property in the vicinity. The principle decided in that case, is applicable to this. See *Perry v. City of Worcester*, 6 Gray, 514; *Rochester White Lead Company v. City of Rochester*, 3 Comstock, 473.

 Ferguson v. Davis County.

VI. The court instructed the jury that in determining the question of damages they should take into consideration the mental and physical suffering and pain caused by the injury. The giving of this instruction is assigned as error. That mental anguish caused by the injury inflicted is proper to be considered was recognized by this court in *Muldrowney v. Illinois Central R. R. Co.*, 36 Iowa, 462. In *McKinly v. The C. & N. W. R. Co.*, 44 Iowa, 314, this court was divided in opinion whether mental anguish arising from the nature and character of the assault is an element of compensatory damages, a majority of the court holding that it is. We unite, however, in the conclusion that mental suffering, not arising simply from wounded or injured feelings, but from actual physical injury inflicted, may properly be considered in estimating compensatory damage. In giving this instruction there was no error.

VII. It is insisted that the court erred in instructing the jury as follows: "If you find from the evidence that the defendant was not negligent in the original construction of said bridge, then the defendant would not be liable for any injuries caused by the same becoming out of repair and defective, unless the defendant had notice thereof or knowledge thereof through the members of the board of supervisors, or unless the defect was so notorious that the defendant was negligent in not knowing it; or unless the bridge had been built so long that, in the exercise of ordinary care and prudence, the defendant ought to have known that it would in such time, become rotten and dangerous." It is claimed that this instruction expresses the idea that from length of time, alone, the county would be liable. The instruction is not vulnerable to this criticism. The instruction merely recognizes the doctrine that the bridge may have been built so long, and become so old, that the defendant, in the exercise of ordinary care and prudence ought to have known that it would in such time become rotten and unsafe. The instruction

6. COMPENSATORY damages: mental suffering.

7. BRIDGES: defective: notice: liability.

 Ferguson v. Davis County.

does not refer to the condition of the bridge which would render the defendant liable, but the knowledge, or means of knowledge, of the condition of the bridge. That the instruction announces a correct rule, we entertain no doubt.

VIII. The defendant complains of the giving of the following instruction: "But if you find from the evidence that a. — : — : said bridge by reason of defective construction or failure to repair. by age, had become rotten and dangerous, and you further find that the defendant knew such facts, or should have known the same, in the exercise of ordinary care and prudence, or that it was notified thereof, then it would be the duty of the defendant, within a reasonable time thereafter to make an examination of said bridge, or cause it to be done, and then to repair the bridge or to adopt means to prevent its use by the public, either by putting up barricades or in some way warning the public of the dangerous condition of the bridge, and to prevent its use by the public; and if the defendant, being so notified, or having such knowledge did not so act, then the defendant would be guilty of negligence, and if such negligence caused such injury to the plaintiff, then the defendant would be liable therefor, unless you should further find from the evidence that the plaintiff was negligent, and that his negligence contributed to the said injury. Notice to any one member of the board of supervisors would be notice to the defendant." The appellant seeks to establish the erroneousness of this instruction by supposing a state of facts not shown to exist in any case. The real thought of the instruction is that if the defendant knew, or should have known, in the exercise of reasonable prudence that the bridge had become unsafe, it should have repaired it, or prevented the public from using it. The dictates of humanity, as well as principles of law, impose upon the defendant this duty. As applied to the facts of this case the instruction is, we think, correct, and we would not feel justified in reversing the case, simply because the ingenuity of counsel can imagine or suppose a case in which it might

not be the duty of a board of supervisors to repeat the examination of a bridge every time they were informed that it was unsafe.

IX. The defendant assigns as error the giving of the following instruction: "The board of supervisors is charged by
 9. ———: In- law with the duty of supervising and keeping the
 spection of: county bridges in repair. If the members of the
 negligence. board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide some one possessing such skill; and to have all county bridges under their care examined as frequently as men of ordinary prudence and care would deem necessary for the safety of the traveling public, and as experience demonstrated the necessity of examination, and if the board failed to do this, such failure would be negligence."

The criticism made upon this instruction is that it does not define whose experience shall govern the action of the board, whether the experience of the supervisors, who are required to exercise only ordinary care, or the experience of the skilled examiner whom they employ to inspect for them. Even if the instruction means the latter, we think it is not erroneous. For if the board themselves did not possess the requisite skill to make an inspection of the bridge, then in the matter of inspection, as well as in the frequency with which it should be made, they ought to be governed by the experience of the skilled person employed by them for that purpose.

X. The defendant assigns as error the giving of the following instruction: "If you find from the evidence that the de-
 10. ———: board of sup-
 fendant caused said bridge to be examined at some
 ervisors: no- time prior to the accident by a person who pos-
 tice of defect. sessed reasonable and ordinary skill in such mat-
 ters, and find that he reported the bridge safe for a reasonable length of time, then the defendant would not be negligent for a failure to cause it to be examined until the expiration of such time, unless some member of the board of supervisors was

Ferguson v. Davis County.

notified that it had become dangerous and unsafe for public travel, and had neglected thereafter, within a reasonable time, to make examination to ascertain its condition." It is said that this instruction may be criticised for requiring an examination every time that some person notifies the board that the bridge is dangerous, and making this negligence *per se* without regard to prior care of the board. The evidence shows, however, that the last examination of the bridge was made, by one Lane, in February, 1873, when he reported that he thought the bridge would run four years, or about four years.

The accident to plaintiff occurred on the 10th day of June, 1875. Surely it was the duty of the board, not having an examination made for two and one-half years, to cause an examination to be made upon being informed that the bridge was dangerous. As applied to the facts of the case the instruction is not erroneous.

XI. The defendant assigns as error the giving of the following instruction: "If you find from the evidence that the
11. —: —: said bridge had been out of repair and dangerous,
knowledge of defect. because of rot and decay, for seven or eight months before it fell, and you further find that it was an old bridge, which had stood for a period of time greater than the average life of the timber such as was used in the bridge, and you further find that the defendant took no measure to ascertain the condition of the bridge, the defendant would be guilty of negligence." As applied to the facts of this case this instruction is erroneous, and, we think, it may have been prejudicial. It appears without conflict that the bridge was examined and repaired by a mechanic, in February, 1873. He reported that he thought the bridge would run about four years. Now, in view of this examination and report, the mere fact that the bridge had stood for a period greater than the average life of the timber of which it was composed, and had been rotten and unsafe for seven or eight months, without ex

Searcy v. Miller.

amination by the board, would not render the defendant liable, unless some member of the board knew, or was informed of its unsafe condition, or in the exercise of reasonable care should have known of it. This is the doctrine of the instruction considered in the tenth point of this opinion, and the instruction now under consideration is not only erroneous, but is also in conflict with the foregoing instruction, in that it leaves out altogether the element of knowledge on the part of, or information to the board or a member thereof.

REVERSED.

SEARCY V. MILLER.

1. **Action:** COGNIZABLE IN EQUITY: LOST NOTE. An action to recover the amount of a note, of which the defendant wrongfully and fraudulently obtained, and still holds possession, is not cognizable in equity.
2. —: —: EQUITY. Other facts of this case considered and held not to be of such a nature as to render the case cognizable in equity.
3. —: —: PRACTICE. Where the only objection urged by the defendant in the trial court was that the case was designated as in equity, and therefore plaintiff was not entitled to a trial by jury, he cannot raise the objection here that no motion was made to transfer the case to the law docket. A specific objection having been interposed in the court below, none other can be considered here.
4. **Evidence:** COMPETENCY OF WITNESS: RELIGIOUS BELIEF. Upon cross-examination a witness was allowed to be questioned as to his belief in a Supreme Being and in a state of future rewards and punishments.
Held:
 1. That the religious belief of a witness might be shown for the purpose of affecting the credibility of his testimony, and that Art. I, Sec. 4 of the Constitution did not prohibit such inquiry.
 2. That the want of such religious belief could not be established from the examination of the witness upon the stand. It must be shown, if at all, by his previous declarations voluntarily made. He cannot be required to divulge his religious opinions.

Searcy v. Miller.

Appeal from Keokuk Circuit Court.

TUESDAY, DECEMBER 20.

ON the 5th day of July, 1880, the plaintiff commenced her action against the defendant, on a promissory note for \$1,200, executed by the defendant to Civilla Jones, now Civilla J. Searcy, the plaintiff, dated February 23, 1874, due twelve months after date. The petition alleges that the note is in the possession of the defendant, who refuses to surrender it to plaintiff; that defendant obtained possession of the note fraudulently of plaintiff's husband, in the month of February, 1878, without value and without the knowledge or consent of plaintiff, and refuses to let plaintiff have, or to pay, or account for it; that the note, less credits, is plaintiff's property, and unpaid; that said note was given by defendant for money borrowed of plaintiff and was part of the purchase-money for certain real estate which the defendant still owns.

The plaintiff prays that the defendant be required to produce said note on the trial of the cause, and attach a copy thereof to his answer, that she have judgment for the amount due on said note, and a special lien on the land described, for the amount of said judgment.

In the second count of the petition plaintiff alleges that about November, 1875, she loaned defendant \$30, which is due and unpaid.

Afterward the plaintiff filed an amendment to her petition, alleging that the fraud mentioned in the petition consisted in this: That defendant fraudulently and falsely pretended to plaintiff's husband that plaintiff was indebted to one Adams, and she might lose the note unless it was placed in defendant's hands for safe keeping; that said claim was only for a small amount and plaintiff was not liable thereon, and defendant induced plaintiff's husband to give up said note for a mere nominal consideration that he might cheat and defraud plaintiff

Searcy v. Miller.

out of more than \$1,600, all of which was without the knowledge, consent or ratification of plaintiff.

The defendant answered, admitting the execution of the note, that he has possession of it, and setting forth a copy thereof. He alleges, that in October, 1876, he paid plaintiff on said note, \$200; and that in February, 1878, for a consideration named, plaintiff surrendered up to defendant said note, and defendant then paid the same and took up the note. To the claim set up in the second count of the petition the defendant pleaded the statute of limitations. The defendant sets up various items of counter-claim, on which he asks judgment against plaintiff for \$1,000.

Afterward the defendant filed an amendment to his answer, alleging that at the time defendant obtained possession of the \$1,200 note set forth in petition, plaintiff was indebted to one Adams, and fearing he would recover a judgment and levy on said note, for the purpose of hindering said Adams in the collection of said debt, she, for the sum of \$25, sold said note and surrendered it up to the defendant for said fraudulent purpose, and is estopped from now claiming thereon. The plaintiff filed a reply denying liability on the items of counter-claim, and pleading settlement and payment therefor. The cause being reached for trial the plaintiff withdrew her prayer for a vendor's lien, and demanded a jury, to which the defendant objected on the ground that the case is in equity, and the plaintiff is not entitled to a jury. Against the objection of defendant the cause was submitted to a jury, to which the defendant objected.

The jury returned special findings and a general verdict for plaintiff for \$1,865.66. The defendant appeals.

Woodin & McJunkin, for appellant.

J. A. Donnell and Sampson & Brown, for appellee.

DAY, J.—It is insisted that the court erred in submitting

Searcy v. Miller.

the cause to a jury for trial as a law action. This involves a determination of the question whether the cause was properly at law or in equity. The clerk in making up the calendar designated the cause as in equity. The plaintiff made no such designation of the case, the names of the parties to the action being followed by the word "petition" as in ordinary proceedings, and not by the words "petition in equity," as in equity proceedings. See Code, § 2646. Does the petition seek relief which is of an equitable character?

1. The plaintiff seeks to recover upon a note in the possession of the defendant. It matters not by what means the defendant obtained possession of the note, if the note is still unpaid. Independently of statute an action upon a lost note must be in equity, to the end that the defendant may be indemnified against the chance of the note being found and again asserted against him. No such reason applies where the note is in the hands of the defendant. Our statute provides that an action upon a lost note or bond may be by ordinary proceedings (Code, § 2512); *a fortiori* may the action be at law where the note sued upon is in the hands of the defendant. In 2 Parsons upon Notes and Bills, page 292, it is said: "If an action is brought upon a note transferable by mere delivery, and the plaintiff proves that he has lost it in some way, and then he traces it into the possession of the defendant, there seems to be no reason why he may not now, and even without notifying the defendant to produce it, substitute a copy, on proof of its contents, for the note itself, and sue it at law. For it can never be negotiated as against the defendant, but by his own act or concurrence. So, wherever an acceptor or other party has wrongfully got possession of a bill of exchange or note, an action may be had against him, as such party to the paper, at common law." See authorities cited in note *t*, page 292, and note *w*, page 293. In note *t* it is said that "a note in defendant's possession cannot be sued in equity, because there is

Searcy v. Miller.

a perfect remedy at law." In our opinion the fact that the plaintiff sues upon a note of which the defendant wrongfully and fraudulently procured, and still retains possession, does not make the cause cognizable in equity.

2. The plaintiff prays that the defendant be required to produce the note on the trial, and attach a copy of it to his answer. Under our system of procedure this can amount to no more than notice to produce the note, to the end that secondary evidence of its contents might be introduced. As an action for discovery in equity, this relief could not be demanded under the provisions of section 2523 of the Code. Besides, before this action was set down for trial at law, the defendant had answered, setting out a copy of the note sued on. The relief sought in this part of the prayer had been granted, and no issue upon it was pending. No equitable issue as to the right to the production of the note was to be tried, and the mere fact that the plaintiff asked that defendant be required to produce the note, did not make the whole case cognizable in equity.

3. In the original petition the plaintiff prayed the establishment of a lien upon real estate which the defendant purchased with the money for which the note was given. It must be conceded that if such lien could be established at all, it could only be done in equity. But when the case was called for trial, and before a jury was demanded, the plaintiff struck from the petition the prayer for a lien. We are, therefore, of opinion, that, when the cause was set down for trial, it involved no issue cognizable upon the equity side of the court.

4. The appellant seems to rely in the argument upon the fact that plaintiff made no motion to transfer the cause to the law docket, as provided in section 2515 of the Code. But no objection to the action of the court was made in the court below upon that ground. The objection which the defendant made in the court below was, not that

Searcy v. Miller.

the cause was upon the equity docket, and must be tried there, but that the *case was in equity*, and therefore the plaintiff was not entitled to a jury. A specific objection having been interposed in the court below, none other can here be considered. The case of *Henderson v. Legg*, 16 Iowa, 486, relied on by appellant, is not, it seems to us, in point. In that case notes and a mortgage were given up for a deed for land upon a false and fraudulent representation, that the land was unincumbered. The action was brought to rescind the contract of sale, to restore the original mortgage, and foreclose it. It was simply held that the action was equitable, and triable by the first method. The distinction between that case and the present is apparent.

In our opinion the issues involved in the case, at the time of its submission to a jury, were all cognizable at law, and the court committed no error, of which defendant can complain in ordering that it be tried by a jury.

II. One James Harbaugh was introduced as a witness by defendant, and gave important testimony. He was then cross-examined as follows: Q. Have you any religious belief? A. 4. EVIDENCE: competency of witness: religious belief. Well, it is very weak, if I have any religious principles. I am not much of a religious man. Q. Have you any belief in a state of future rewards or punishments? A. It is very faint. I am actually not a believer in these articles. Q. Have you any belief in a Supreme Being? A. I do not know what it is. Of course there is a first cause for something, but I do not know what it is; I do not know anything to believe upon it.

No objection was made to the first question or answer. The second and third were objected to as incompetent, irrelevant, and immaterial. The objection was overruled and defendant excepted.

In *State v. Elliott*, 45 Iowa, 486, it was held competent to prove as affecting the credibility of one whose dying declarations were introduced, that he was a materialist and believed

Searcy v. Miller.

in no God or future conscious existence. This decision is based upon the ground that, whatever rendered a witness incompetent at common law, might be shown under section 3637 of the Code of 1873, to lessen his credibility. This section is as follows: "Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." This section first appeared as section 2389 of the Code of 1851, and afterward as section 3979 of the Revision. Sections 35 of the Code of 1851, 38 of the Revision, and 53 of the Code of 1873, are as follows: "The terms 'heretofore' and 'hereafter, as used in this Code, have relation to the time when this statute takes effect." The constitution of 1846, article 1, section 4, provides that no person shall be rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion. It is now claimed by appellant that the word "heretofore" as used in sections 2389, Code of 1851, 3979 of Revision, and 3637 of the Code of 1873, has reference to the law when the Code of 1851 took effect, as modified by the constitutional provision as above named, and that we were in error, in *State v. Elliott, supra*, in referring it to the state of the common law before that period. So far as we have been able to discover, section 2388 of the Code of 1851, is the first statutory provision on the subject of evidence after the adoption of the constitution of 1846. It provides that every human being shall be competent, except as otherwise declared, and is, in substance, but a redeclaration of the constitutional provision, that no person shall be rendered incompetent on account of his opinions on the subject of religion. Having provided generally for the competency of all persons, the subsequent sections proceed to introduce an exception on the ground of interest, and nearly all the exceptions recognized at common law other than as to persons incompetent at common law, on account of the lack of a "religious sense of accountability to the Omniscient Being, who is invoked by an oath." At the

Searcy v. Miller.

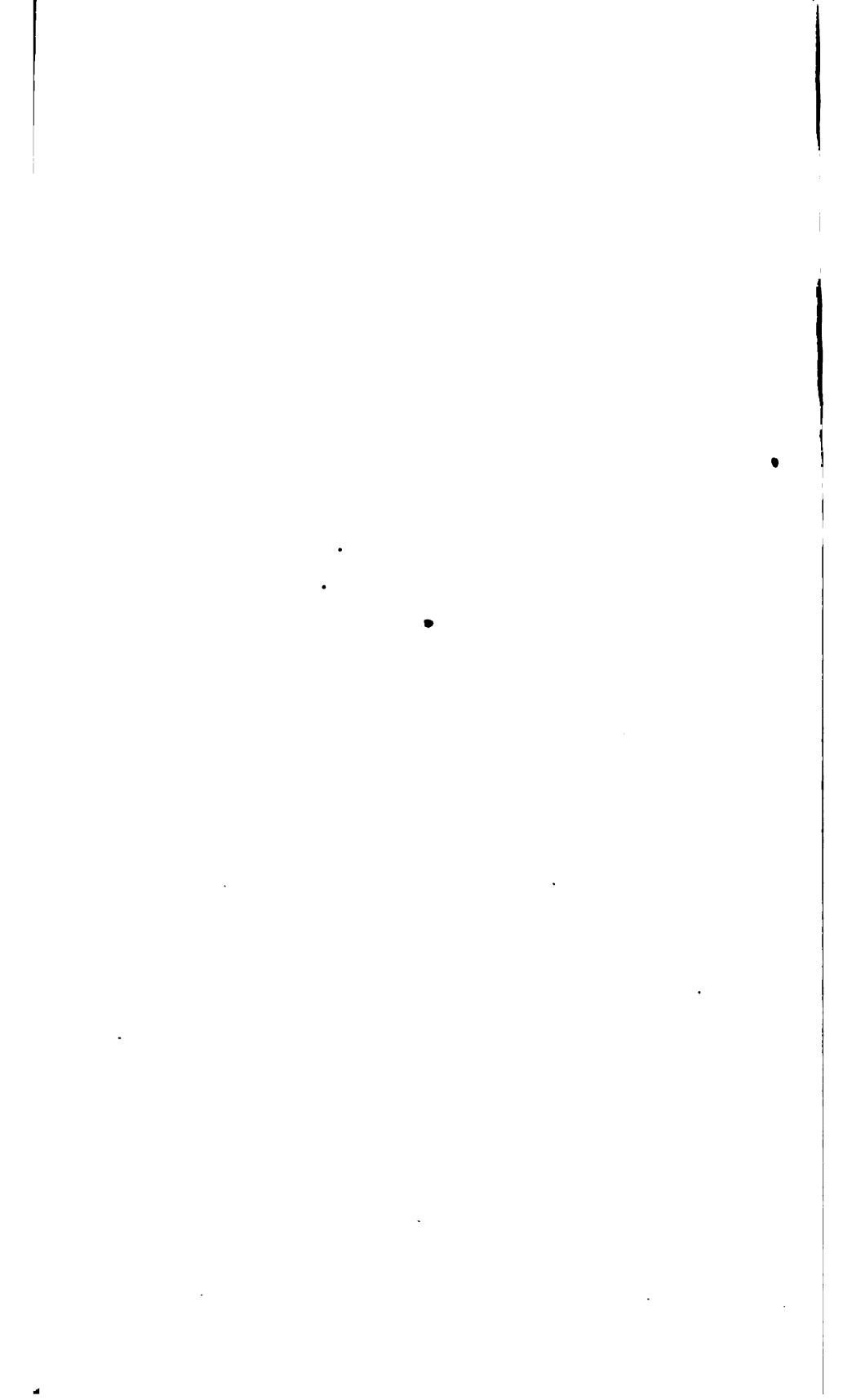
time when section 2389 of the Code of 1851 was enacted, providing that "facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility," no case had found its way into the appellate court of this State in which the provisions of article 1, section 4 of the constitution, had been applied and enforced. Up to that time the decisions of courts in England, and in this country, had excluded as incompetent, witnesses who were "insensible to the obligations of an oath, from defect of religious sentiment and belief," and no different rule had been practically authorized by the adjudications of the Supreme Court of this State. Now, when the word "heretofore" was used in section 2389, we think it must have referred to facts which the courts had theretofore held should cause the exclusion of testimony, rather than to a constitutional provision intended to govern the action of courts, but which had never received judicial application. It is claimed that if section 2389 authorizes insensibility to the obligations of an oath to be shown to lessen the credibility of a witness, it is unconstitutional. It is to be observed, however, that article 1, section 4 of the constitution simply provides that a person shall not be rendered incompetent to give evidence, in consequence of his opinion on the subject of religion. It is not provided that the credibility of his evidence may not be lessened. The questions which were objected to sought to elicit the fact whether the witness had any belief in a state of future rewards or punishments, and any belief in a Supreme Being. In 1 Greenleaf on Evidence, section 369, it is said: "It may be considered as now generally settled in this country, that it is not material whether the witness believes that the punishment will be inflicted in this world or the next. It is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath." In *Ormichund v. Barker*, Willis, 545, S. C., 1 Atk., 21, the proper test of a witness on the score of a religious belief was settled to be the belief of a

Searcy v. Miller.

God, and that he will reward and punish us according to our deserts. See authorities cited in note 3 to section 369, 1 Greenleaf on Evidence. In admitting proof of the fact that the witness did not believe in a future state of rewards and punishments, the court erred.

III. The questions under consideration were allowed to be asked of the witness on cross-examination. This was not proper. In 1 Greenleaf on Evidence, section 370, it is said: "The State of his religious belief, at the time he is offered as a witness, is a fact to be ascertained. The ordinary mode of showing this is by evidence of his declarations, previously made to others, the person himself not being interrogated. The want of such religious belief must be established by other means than the examination of the witness upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinion upon that subject in answer to questions put to him while under examination. If he is to be set aside for want of such religious belief, the fact is to be shown by other witnesses, and by evidence of his previously expressed opinions voluntarily made known to others." *Commonwealth v. Smith*, 2 Gray, 516. See Greenleaf on Evidence, 12th edition, page 417, note 2, and page 418, note 1. We discover no error in the instructions. It is claimed the verdict is excessive, but as the judgment must be reversed on other grounds, this objection need not be considered.

REVERSED.



REPORTS
 OF
Cases in Law and Equity.
 ARGUED AND DETERMINED IN THE
 SUPREME COURT
 OF
THE STATE OF IOWA,
 DES MOINES, JUNE TERM, A. D. 1882.

IN THE THIRTY-SIXTH YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS,	CHIEF JUSTICE.
" JAMES G. DAY,	}
" JAMES H. ROTHROCK,	
" JOSEPH M. BECK,	
" AUSTIN ADAMS,	
	JUDGES.

ALLEN V. THE B., C. R. & N. R. Co.

1. **Damages: PERSONAL INJURIES: EVIDENCE.** In an action for personal injuries sustained by a brakeman, while getting off a moving train to turn a switch, witnesses were allowed to testify that it was "in the line of his duty" for a brakeman to get off over the side of the car, while the train was in motion. *Held*, error.
2. —: —: —. Where witnesses for the plaintiff had testified that a certain "cattle chute" was constructed dangerously near the track, the evidence offered by the defendant that persons had frequently ridden past it holding to the side of the car, was proper and should have been received.

57	623
101	672
57	623
108	146
57	623
118	92
113	229

Allen v. The B., C. R. & N. R. Co.

3. **Instructions: CONSIDERED TOGETHER.** All the instructions must be read and considered together, and where it is not probable the jury have been misled by the omission of a certain qualification in one which was explicitly given in others, there was no error.
4. **Railroads: NEGLIGENCE.** Where a railway company erects "cattle chutes" in such close proximity to its track as to endanger the lives of its employes, in the proper operation of its trains, it is negligence. If the "chutes" are constructed so as to be reasonably safe for employes operating trains in a reasonable and prudent manner, the company is not chargeable with negligence.
5. **Instructions: REFUSAL TO GIVE.** Where the doctrine of an instruction asked was fairly presented in one given by the court, the refusal to give it, though proper in itself, was not error.

Appeal from Des Moines District Court.

TUESDAY, MARCH, 21.

ACTION to recover damages sustained from personal injuries received by plaintiff while employed as a brakeman upon defendant's railroad, which were caused by negligence of defendant. There was a verdict and judgment for plaintiff. Defendant appeals.

J. & S. K. Tracy, for appellant.

Newman & Blake and *Dodge & Dodge*, for appellee.

BECK, J.--I. The plaintiff, in the discharge of his duty as a brakeman, was required in the night-time to couple to his train certain cars upon a side track, to be taken or removed by his train. A "cattle chute" was situated near this side track which was passed by the cars under the charge of plaintiff, upon one of which, a coal car, he was at the time, having previously made the coupling. While getting down from the car in order to change a switch, the train being in motion, he was struck by the "cattle chute" and thrown to the ground. A wheel of one of the cars ran over his foot, crushing it so that amputation became necessary. The "cattle chute" was

Allen v. The B., C. R. & N. R. Co.

shown to be from nineteen to twenty-three inches from the passing car.

The issues in the case involve the negligence of the defendant in constructing the "cattle chute" too near the side track, and the want of care of the plaintiff in getting down from the car in such manner that he was struck by the "cattle chute."

Upon these issues the following testimony on the part of plaintiff was introduced, against defendant's objection:

Mr. Partland, a witness for plaintiff, testified in response to the following questions:

"1. Tell the jury the usual way that brakeman get on and off these coal cars, in proper railroading, in the line of their duty? Ans. There is but one safe way to get on the car; that is to get up by placing the foot on the truck or journal box, and get off the same way. * * * * *

"2. Now, from your experience as a brakeman, will you please tell the jury if this chute stood fifteen or nineteen inches from the outside edge of the car, whether that was a reasonably safe distance for a brakeman to operate and endeavor to get ready to get off a car in the night-time in the dark? Ans. It is not a safe distance from the track, because it will not permit a man passing between the car and chute."

Turner, a witness for plaintiff, was permitted, against defendant's objection, to testify as follows:

"1. Tell the jury how a brakeman, in the line of his duty, would prepare to get off a coal car to turn a switch in the night-time? Ans. Get over the side of the car and land on the box-stand, on the journal.

"2. Is it within the line of duty of a brakeman, who is switching in this way, to wait until the train has run down past the switch and then get off and turn the switch? Ans. No, sir; it is not his duty to do that—to wait until the train stops.

"3. I will ask you whether it is in the line of duty of a brakeman to get off a car at a switch for the purpose of turning

Allen v. The B., C. R. & N. R. Co.

it while it is in motion? Ans. Yes, sir; it is the duty of a brakeman to work as quick as he can, and to do this he must get on and off the train while it is in motion.

"4. Is there any danger to a brakeman in the line of his duty in getting off the side of a coal car, or getting ready to get off the side of a coal car, in the night-time, to turn a switch, on account of a solid body being fifteen or nineteen inches distant from the outer edge of the car? Ans. There is; it is impossible, I should think, for a man's body to pass through a space of that kind, and for that reason there would be danger—all possible danger."

Parker, another witness for plaintiff, was permitted to testify as follows:

"1. In going up to the cars, state whether it is within the line of duty of a brakeman to get off the car when it is in motion. Ans. Yes, sir; he should get off the car—be ready to get off at the switch. In preparing to get off, it would be his duty to get over the side of the car.

"2. Where should he place himself? Ans. In a car of this kind he would have to stand on the journal-box; get over the side and put his foot on the box and his hands on the side; this would be within the line of his duty.

"3. How soon should a brakeman prepare to get off his train—jump off a moving train and turn a switch—to be within the line of his duty? Ans. In time to get off at the switch, he would be in the line of his duty if he prepared to go off at once, when the train is operated with steam brakes, and when he only goes ninety-five steps."

Other evidence, to the same effect, was admitted against defendant's objection.

II. This testimony, in our judgment, is an expression of the opinion of the witnesses, which will plainly appear upon brief consideration. The witnesses declared that certain acts were within the "line of the duty" of the brakeman. While it was competent for the

1. DAMAGES:
personal in-
juries: evi-
dence.

Allen v. The B., C. R. & N. R. Co.

witnesses to state, as a fact, what services were performed by the brakeman in the discharge of his duty, they ought not to have been permitted to express an opinion that a particular manner of performing such services was required of him in the discharge of his duty.

The duty of a brakeman may be prescribed by rule of the company employing him, or by custom prevailing in the operation of railroads. It pertains to the particular services performed and the purposes to be accomplished. It may require him to couple and uncouple cars, to change switches, to check the speed of the train, etc., etc. It requires him to do these things in a reasonable, careful, and prudent manner, with a view to his own safety as well as the safety of the train. He is required to use the appliances intended for the different work done by him. The discharge of his duties may be performed in different ways. The manner of his performance of duty must be distinguished from the duty itself. Now, a brakeman in the discharge of his duty is required to descend from a car in order to change a switch. The descent may be made in a prudent or in a careless manner. But the brakeman would not be excused for carelessness, on the ground that his duty required him to descend, if the act could have been done in another manner with greater safety.

The expression in the evidence just quoted "in the line of duty," was doubtless used in its correct meaning as synonymous with the words, "in the discharge of duty." The court, in the instructions, used the expression in this sense. The jury understood the witnesses, when they declared an act of the brakeman to be "in the line of duty," to express the opinion that the duty of the brakeman required him to perform the act. The witnesses were thus permitted to express the opinion that the act done by the plaintiff was required in the proper discharge of his duty, and that plaintiff was not chargeable with negligence, because the act was required in the discharge of duty. But it was the province of the jury to determine

Allen v. The B., C. R. & N. R. Co.

whether the act was required of plaintiff in the performance of services imposed upon him, or whether such act could not have been done in another manner, attended with less danger. The witnesses could have explained to the jury the nature of the services rendered by plaintiff when he was injured, the performance of which was imposed upon him by his duty as brakeman, and the usual or customary manner of performing these services, but they ought not to have been permitted to express the opinion as to plaintiff's care or negligence. The fault of the evidence is that the witnesses, by declaring that the particular acts of plaintiff done at the time, that is the manner of the discharge of the services rendered, were required by the duty of plaintiff, thus expressing the opinion from which the inference would be drawn that plaintiff was not chargeable with any negligence. But the question of plaintiff's care or negligence in descending from the car cannot be determined upon the opinion of those familiar with the services in which he was engaged. It is not a proper subject for expert testimony.

These conclusions are in accord with prior decisions of this court. See *Hamilton v. The Des Moines Valley R. Co.*, 36 Iowa, 31; *McKean v. The B., C. R. & N. R. Co.*, 55 Iowa, 192.

III. The defendant offered evidence to show "that persons had frequently ridden on cars, as broad as this one, between the 2. —: —: cattle chute and the outside of the car, and that —: the cattle chute was the same then as it is now." This testimony was then rejected. It ought to have been admitted.

Witnesses for plaintiff had testified that a man could not ride by the chute holding to the side of the car, as indicated in the proposed evidence, and it was declared by more than one witness for plaintiff to be extremely dangerous. The testimony proposed tended to contradict the evidence introduced on this point by plaintiff, and to show that the cattle chute was

 Allen v. The B., C. R. & N. R. Co.

not constructed in dangerous proximity to the side-track. These matters were directly involved in the issues in the case.

IV. Counsel for defendant insist that the ninth and tenth instructions given by the court are erroneous, for the reasons

3. INSTRUCTIONS: con- that they recognize the theory of plaintiff's wit-
sidered to- nesses as to the care exercised by plaintiff, and as-
gether. sume that defendant was negligent. The instruc-
tions direct the jury that if they find plaintiff was swinging to the
side of the car, "and this was in the *line of his duty*, or was
ordinary care, and not negligence, they should find for the
plaintiff." The question of plaintiff's care was for the jury
to determine. The court was not authorized to say that "swing-
ing to the side of the car," as a matter of law, was negligence.
If brakemen have no other ways of reaching the ground than
by climbing down the side of the cars, and if they are re-
quired to do so when the cars are in motion, they are not, as
matter of law, negligent in descending the cars in that manner.
They can do so only by "swinging to the side of the car,"
which, therefore, does not constitute negligence *per se*.

While the instructions now under consideration do not in-
form the jury that plaintiff cannot recover unless defendant
was negligent, yet such directions were explicitly given in
other instructions, the third and fourth. It would have been
better had the same thought found expression in these instruc-
tions. But as all the instructions are to be read together, and
were so read by the jury, it is hardly probable that they were
misled by the omission of the qualification under considera-
tion from the two instructions complained of by counsel.

V. The defendant, in the third and fifth instructions re-
quested by its counsel, asked the court to instruct the jury that

4. RAIL- the defendant "had the right to construct its cat-
ROADS: neg- tle chute in such manner and in such close prox-
ligence. imity to the railroad track as would best subserve its purpose in
safely loading and unloading live stock," and that defendant
is not, therefore, chargeable with negligence in causing the in-

Jiska v. Ringgold County.

jury sustained by plaintiff. These instructions were properly refused. The law requires defendant to exercise thought for the safety of its employes. Its care is not to be exhausted in providing for the safety of the cattle taken upon the train. Human life demands of it consideration.

VI. The fourth instruction asked by defendant presents a correct rule. It is, in substance, that if the chute was constructed so as to be reasonably safe for employes operating trains in a reasonable, safe, and prudent manner, defendant is not chargeable with negligence on account of the character and condition of the chute. The doctrine of this instruction is fairly presented by the seventh, given by the court. Its refusal was not, therefore, erroneous, though it may well have been given.

VII. The instructions given by the court, we think, are correct. No objections thereto are urged in argument except to the ninth and tenth above considered. The instructions asked by defendant, so far as they are correct, are repetitions of those given. For the errors in admitting and excluding evidence above pointed out, the judgment of the District Court is

REVERSED.

57	630
d107	475
57	630
112	330
57	630
142	167

JISKA V. RINGGOLD COUNTY ET AL.

1. **Taxes: DELINQUENT: INNOCENT PURCHASER.** Where the purchaser of real estate obtained a certificate from the treasurer that there were no delinquent taxes on the property, and the tax books did not show any tax to be due, but it was afterwards found there were delinquent taxes due thereon at the time, which had not been brought forward in the tax books, he would be an innocent purchaser, and would take such real estate free from all liens for taxes.
2. —: —: **WHEN NOT A LIEN.** In such case, if the delinquent taxes are brought forward in the tax books after the purchase, they will not be a lien upon the property as against the purchaser.

Jiska v. Ringgold County.

Appeal from Ringgold District Court.

TUESDAY, MARCH 21.

AORION in equity to have declared void, as to the plaintiff, certain taxes, and have the same canceled of record as a lien on certain real estate. A demurrer to the petition was overruled, and the relief asked granted. The defendants appeal.

Laughlin & Campbell, for appellant.

Askren Bros., for appellee.

SEEVERS, CH. J.—The amount in controversy being less than one hundred dollars, certain questions have been certified as to which it is said to be desirable to have the opinion of the Supreme Court. The only questions discussed by counsel are the following:

“1. Where a person purchases real estate, and at the time of purchasing the same the treasurer of the county where the real estate is situated gives the purchaser a certificate that there are no delinquent taxes on said real estate, and the purchaser causes the tax books to be examined, and no taxes are delinquent, as shown by the books, and afterwards it is found that, at the time of the treasurer giving the certificate, and of said purchase, there were delinquent taxes on the land purchased, but had not been carried forward on the tax book from year to year, can the treasurer afterwards carry the delinquent taxes forward, and enter them on the tax book against the said real estate, and collect the same by sale of the real estate?

“2. And in such cases are the delinquent taxes, after they have been brought forward, and entered on the tax book, a lien against the real estate on which they were assessed as against the purchaser?”

The plaintiff purchased the land in 1874, and the taxes in

Jiska v. Ringgold County.

controversy were levied in 1871, became delinquent in 1872, but were not brought forward on the tax books of any year subsequent to 1871, until after the plaintiff's purchase. Section 845 of the Code provides: the treasurer shall bring forward and enter on the tax books for each year the unpaid taxes for any preceding year, and that "any sale for the whole or any part of such delinquent tax not entered shall be invalid." Section 848 provides that the treasurer, on the request of any one interested, shall certify the amount of taxes due upon any parcel of real estate, and section 865 provides that "taxes upon real property shall be a perpetual lien thereon * * * against all persons except the United States and this State."

There should be some way by which a person desiring to purchase real estate can, with reasonable certainty, ascertain what liens are thereon, and the exact condition of the title. Real property is daily purchased because such, in fact, is the rule. If it be otherwise as to taxes, this constitutes an exception to the general rule. The statute should not be so construed unless the language employed, or justice and equity absolutely so require. It is a familiar rule of construction that all statutes bearing on the same subject should be considered for the purpose of arriving at the legislative meaning and intent. The statute requires the delinquent taxes to be brought forward and entered on the tax books of each year. Where this is done they become a perpetual lien against all persons. Section 845 precedes 865, and it should be presumed the latter provision was enacted in view of the former. In other words, before the force and effect contended for by the appellant can be given to section 865 it must appear that the provisions of section 845 have been complied with. This thought is strengthened by the provisions of section 848, requiring the treasurer to give the certificate therein contemplated, to the end that a purchaser may know the extent of the liens for unpaid taxes, and with safety pay the purchase-money.

Lewis v. Eshleman.

The first question asked by the District Court is based on the fact that before purchasing the plaintiff obtained such a certificate, and also caused an examination of the tax books to be made. He could do no more, and must be held to be an innocent purchaser, entitled to protection as such. *Cummings v. Easton*, 46 Iowa, 183.

It will be observed a sale is invalid if made for delinquent taxes not brought forward. This must be on the theory the 2. —: —: taxes, until thus brought forward, ceased to be liens. when not a lien. If this is not so there would be no reason for declaring the sale invalid. At the time the plaintiff purchased the real estate, the taxes in question were not liens thereon, and no subsequent act of the treasurer could have the effect of making them such to the plaintiff's prejudice.

The result is, both questions must be answered in the negative.

AFFIRMED.

LEWIS ET AL V. ESHLEMAN ET AL.

1. **Parties: MISJOINDER OF: INJUNCTION.** Several persons owning distinct tracts of agricultural lands, lying within an incorporated town, joined in an injunction suit to restrain the collection of municipal taxes thereon. The land was not similarly situated in respect to the town and the plaintiffs did not all ask the same relief. *Held*, that there was a misjoinder of parties and causes of action; and that plaintiffs having failed to strike out all the parties plaintiffs except one, the court did not err in dissolving the injunction and dismissing the case.

Appeal from Cherokee Circuit Court.

TUESDAY, MARCH 21.

THE plaintiffs presented their petition to the Hon. J. R. Zuver for an injunction, and thereupon a temporary injunction issued as prayed. Afterward the plaintiffs filed an amended

Lewis v. Eshleman.

and substituted petition, alleging in substance that plaintiffs own in severalty separate and distinct parcels of land, situated within the corporate limits of the incorporated town of Cherokee; that all of said lands are held and used exclusively for agricultural purposes; that they are remote from the town proper; have no additions or town improvements near them; are not benefited in any manner by the current expenditure of said town; and are not held by the owners for the purpose of laying them off into town lots and putting them in market as town property; that ever since said town was incorporated it has levied on said lands a tax for corporation purposes, and collected the same from the plaintiffs; that the plaintiff Lewis has refused to pay the tax levied on his lands for 1879, and the defendant Eli Eshleman has advertised the lands, and will sell them unless restrained; that the town of Cherokee has levied for the year 1880 municipal taxes on said lands, and the defendant Chick will, unless restrained, extend the same on the tax books of the county. Plaintiffs pray that Eshleman be restrained from selling any part of said lands, and that Chick be restrained from extending on the tax books of Cherokee county any municipal tax levied on the lands described in the petition, and that, upon the final hearing the levy of said taxes be declared illegal. The defendant filed a motion to dismiss the action, because the petition shows there is a misjoinder of parties; also to strike out of the petition all causes of action but one, and cause plaintiffs to elect which cause of action will be presented, for the reason that there is a misjoinder of causes of action. Afterward the defendants filed a motion to dissolve the temporary injunction, for the reason that plaintiffs are misjoined in the action. Afterward the court made a ruling upon said motions as follows: "Plaintiffs having been given time heretofore to elect whether they would strike out all parties plaintiffs but one, they now elect to stand upon their amended and substituted petition. Defendant's motion to dismiss is sustained and case dismissed, injunction dissolved at

 Lewis v. Eshleman.

plaintiff's costs, and thereupon plaintiff excepts." The plaintiffs appeal.

J. D. Smith, for appellants.

A. F. Merservey, for appellees.

DAY, J.—There was clearly a misjoinder of causes of action and of parties. The plaintiffs own lands in severalty. The ground of the alleged illegality of the tax in question is that the plaintiffs' lands are so situated, respecting the town of Cherokee, that they are not liable to taxation for municipal purposes. The lands cannot be situated in the same place, and hence cannot be situated exactly alike with respect to the town. The plaintiffs have no community of interest. They do not ask the same relief. All the plaintiffs ask that the auditor be restrained from extending the tax for 1880, and in addition to this the plaintiff Lewis asks that the treasurer be restrained from selling his lands for taxes of 1879. The evidence applicable to the case of one plaintiff may not apply to the case of the other plaintiffs. One plaintiff may be entitled to an injunction, and the other plaintiffs may not be so entitled. The case differs essentially from *Brandiff v. Harrison County*, 50 Iowa, 164, cited and relied upon by appellants, as in that case the alleged illegality extended to the assessment itself, and it affected all the plaintiffs in the same manner. In the case of *Duman et al. v. The City of Fort Madison*, also relied upon by appellants, the question of misjoinder was not raised. The plaintiffs having failed to elect to strike out all parties plaintiffs but one, when permission was given them by the court to do so, the court did not err in dismissing the case and dissolving the injunction.

AFFIRMED.

1. PARTIES:
misjoinder
of : injunc-
tion.

57	636
78	443
57	636
134	567

LANCE V. THE C. M. & ST. P. R. CO.

1. **Railroads: AWARD OF DAMAGES: APPEAL: OWNER AND MORTGAGEE.**
Where, in the condemnation of land for railroad purposes, the award of damages was made to the owner and the mortgagee jointly, on proper notice to both parties, the owner may prosecute an appeal therefrom without uniting the mortgagee as a party to such appeal.
2. ———: **RIGHT OF WAY: GROWING CROPS: DAMAGES.** If growing crops were destroyed by the appropriation of the right of way and entry thereunder, the owner may prove the value of the crops as an element of damage.
3. ———: **BUILDINGS: INCREASED RISK: EVIDENCE.** Evidence of the value of the buildings and a grove, and the increased hazard from fire by reason of their proximity to the track, was improperly admitted. It was proper to show the situation, and its effect upon the value of the property may be considered, but the increased danger of the destruction of buildings, and the like, by fire, is too remote and contingent for legal inquiry.

Appeal from Osceola Circuit Court.

TUESDAY, MARCH 21.

THIS is a proceeding to condemn a right of way for the defendant's railroad across certain improved land owned by the plaintiff. It appears from the assessment of the commissioners appointed by the sheriff that one Ozias was the owner of a mortgage upon the farm, and the damage occasioned by the taking of a right of way, was assessed to the plaintiff and Ozias jointly. From this assessment the plaintiff appealed to the Circuit Court by serving a notice of appeal upon the railroad company within the proper time. Afterward the defendant filed a motion to dismiss the appeal because Ozias does not join therein. Thereupon the plaintiff served a notice on Ozias to the effect that he had appealed from the assessment made by commissioners appointed by the sheriff, and stating that the appeal would be for trial at the next term of the Circuit Court. The motion to dismiss the appeal was overruled.

There was a trial by jury, which resulted in an award of dam-

Lance v. The C., M. & St. P. R. Co.

ages greater in amount than that allowed by the commissioners appointed by the sheriff. From this award the railroad company appeals.

George E. Clark and *M. B. Carey*, for appellant.

I. I. Bell and *Argo & Kelly*, for appellee.

ROTHROCK, J.—I. The first point presented in the record involves the question whether the motion to dismiss the appeal, because Ozias, the mortgagee, did not join therein, should have been sustained. Whether it is necessary to make a mortgagee a party to proceedings to condemn land for a right of way, we need not determine. In this case it appears that the assessment was made to the owner of the land and to the mortgagee jointly. We will presume it was done on proper notice to both these parties. We have, then, the question, whether the owner in such case must be denied the right to maintain an appeal because the mortgagee neglects or refuses to join therein. In *C., R. I. & P. R. R. Co. v. Huse*, 30 Iowa, 73, it was held that where damages are assessed jointly to two persons as owners of the *land*, an appeal cannot be taken and prosecuted by one of them without uniting the other therein, or making him a party thereto, by notice or otherwise. The reasoning in that case has no application to the case at bar, simply because the rights of a joint owner and those of a mortgagee are wholly different. Where an award has been made in favor of the owner and mortgagee jointly, the mortgagee may be entirely content with the award, or his security may be such that it is a matter of indifference to him whether any award whatever is made. The land may be ample security for his debt, with the incumbrance of the right of way upon it. In such case it would be a great hardship to deny the owner of the land the right to prosecute an appeal because the mortgagee declined to incur the expense of joining therein; and

1. RAILROADS:
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Lance v. The C., M. & St. P. R. Co.

further, the defendant cannot be prejudiced by the failure of the mortgagee to join in appeal. His rights, with reference to the right of way, were adjudicated by the commissioners appointed by the sheriff, and he is thereby estopped by such adjudication from enforcing his mortgage against the right of way.

II. At the time the railroad company entered upon the right of way there were crops growing thereon, which were destroyed by the building of the road. The court permitted the plaintiff to prove the value of the growing crops as an element of damages. Objection was made to this, and the ruling of the court thereon is assigned as error. The ruling was unquestionably correct. The condition of the land at the time the defendant entered upon it was proper to be shown. The measure of compensation for the right of way is the difference in the value of the land immediately before, and the value after the right of way is taken, excluding the benefits of the road to the farm.

III. The right of way was taken along the edge of a grove of trees which stand between the house and other buildings and the railroad. A number of witnesses were permitted to testify that, owing to the proximity of the grove to the track, there was danger of fire from the engines, running through the dry leaves and destroying the grove and the buildings upon the farm; and testimony was admitted as to the value of the grove and the dwelling-house. All of this evidence should have been excluded for two reasons:

1st. The evidence as to continual danger from fires set out by the engines used in operating the road was incompetent, because mere matter of opinion upon a question not involving science or skill. It was competent to show the situation of the grove and building, and the jury were as well qualified as the witnesses to determine the probable effect upon the property by the operation of the railroad.

2d. The testimony as to the grove and dwelling-house was given in the same connection as that pertaining to the danger from the escape of fire. The jury could have understood the evidence admitted in no other way than that it was allowable to take into consideration the value of the grove and house, upon the theory that they would probably be destroyed by fire. In this view, and indeed in any view, we think, all this evidence was improperly admitted. The compensation allowed for right of way should be direct and proximate, and not remote and contingent upon circumstances which may or may not transpire.

In *Henry v. D. & P. R. R.*, 2 Iowa, 288, the rule was laid down that when by the taking of a right of way the remaining land is thrown open and left in a manner unfenced, this fact will properly enter into consideration in arriving at the depreciated value of the remaining premises; but that the allowance of damages by estimating the value of the fences necessary to be built to again enclose the land, was not permissible. The rule in that case has been repeatedly followed by this court. Now, applying that rule to the evidence admitted in this case, it is plain that no estimate can be made in the way of compensation for the value of property which may be destroyed by fire, and without the fault of the railroad company. The most that can be claimed is that it is competent to take into consideration the risk of fire set out by defendant without its fault, and by reason of the operation of the road through the premises. But this risk, or hazard, or exposure of the property, is an entirely different question from that involved in its destruction by fire without the fault of the company. In the one case, while the risk may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth in fixing the compensation to the owner, in the other case the destruction of buildings, groves, or the like by fire, is a field of inquiry, so remote and contingent as to be without and beyond any range of damages known to the

Miller v. The City of Centerville.

law. Of course it will be understood that we are treating of such risks and hazard from fire as result from the operation of the road in such a manner that if fire should escape there would be no liability as against the railroad company. For its negligence it would be liable to the owner, and this element should not be taken into account in estimating the compensation.

The foregoing discussion disposes of all the material questions involved in the case. For the *error* in admitting the objectionable evidence the judgment will be

REVERSED.

MILLER V. THE CITY OF CENTERVILLE ET AL.

1. **Assignee of Bond:** ACTION BY: COUNTER-CLAIMS: DEFENSE TO. Plaintiff, as assignee, brought suit upon an injunction bond executed by defendant to one M. Defendant set up certain promissory notes given by said M. to defendant, and also a judgment against M. and in favor of defendant, as a set-off and counter-claim. *Held:*

1. That the counter-claims were properly pleaded as against the assignee.
2. That the plaintiff had the right to show that the notes were obtained by duress, and that the judgment was void for want of jurisdiction in the court rendering it. That the plaintiff, as assignee, could assert the same defenses to said counter-claims that M. could have done.

Appeal from Appanoose Circuit Court.

WEDNESDAY, MARCH 22.

THIS is an action to recover damages upon an injunction bond. There was a trial by jury, which resulted in a verdict and judgment for the defendants. The plaintiff appeals.

George D. Porter, for appellant.

Vermillion & Vermillion, for appellees.

Miller v. The City of Centerville.

ROTHROCK, J.—The bond upon which the suit was brought, was executed by the defendants in a certain action for an injunction in which the city of Centerville was plaintiff, and one Peter Miller was defendant. The injunction restrained said Miller from selling ale, wine, and beer within said city. A motion was made for the dissolution of the injunction, which was sustained. Peter Miller assigned his claim for damages upon the bond to the plaintiff herein, and this action was brought to recover the damages which, it is alleged Peter Miller sustained, it being claimed that he had a permit or license from the city to sell the liquors which he was restrained from selling by reason of the injunction.

The defendants in their answer set up a certain promissory note given by Peter Miller to the treasurer of the town of Centerville, by which he promised to pay for the use of the town the amount therein named. They also pleaded a certain judgment in favor of said city and against Peter Miller, and asked that the judgment and note be allowed as a set-off against any amount which might be due on plaintiff's claim on the injunction bond.

1. ASSIGNEE
OF BOND: ac-
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claim: de-
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The plaintiff moved the court to strike out the set-off or cross-claims. The motion was overruled. Thereupon the plaintiff filed a reply in which he averred that the judgment pleaded as a set-off was absolutely void, having been rendered by a court without jurisdiction, and that the note set up in the answer was obtained by duress, and was founded upon a fraudulent and void judgment. The defendants moved the court to strike the reply from the files, upon the following grounds:

"1. The defense that the judgment set up as a counter-claim is void, because the court rendering the same had no jurisdiction to render the same, cannot be interposed and plead in this case by plaintiff, he not being a party thereto, and he cannot attack said judgment collaterally.

"2. Plaintiff cannot interpose the plea to the note set out in the counter-claim, that the same was executed without con-

Miller v. The City of Centerville.

sideration and in settlement of void judgments against Peter Miller, because plaintiff was not a party to said judgments and is not a party to said note, and he cannot attack either collaterally."

The motion was sustained. It is insisted by counsel for appellant that the note and judgment were not proper subjects of set-off or counter-claims in this action, because they were not causes of action arising on contract, or ascertained by the decision of a court, nor were they causes of action against the plaintiff. It is true the note and judgment were not against the plaintiff. But this action is founded upon a written obligation or contract of the city of Centerville, by which it undertook to pay whatever damages Peter Miller should sustain by the wrongful suing out of the writ of injunction. The defendant Evans executed the bond as surety, and his liability is contingent, at least, as between the city and himself. The action is, therefore, founded on contract. One of the counter-claims arose upon contract and the other was ascertained by the decision of a court precisely as required by Sub. 1 of Sec. 2659 of the Code. It is true the counter-claims are not against the plaintiff. But section 2546 of the Code expressly provides that "in case of the assignment of a thing in action, the action shall be without prejudice to any counter-claim defense, or cause of action, whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment * * * *"

We are clearly of the opinion that the counter-claims were properly pleaded and that the court correctly overruled the motion to strike them out. The case of *Exline v. Lowery*, 46 Iowa, 556, cited, by counsel for appellant, is not inconsistent with the doctrine herein expressed. In that case the plaintiff made no claim for a judgment against the party defendant who set up the counter-claims.

Next it is urged that the court erred in striking the reply from the files and thereby precluding the plaintiff from show-

ing that the note was obtained by duress, and that the judgment was void for want of jurisdiction in the court which rendered the same. We think it is very plain that this ruling of the court was erroneous. The assignee of a chose in action succeeds to the rights of the assignor.

If these claims were sought to be enforced against Peter Miller it is very clear that he would have the right to show that the note was obtained by duress and that the judgment was void for want of jurisdiction. The plaintiff herein has precisely the same right to show that the counter-claims are void that Peter Miller would have had if he were plaintiff. He has the right to show that these claims against Peter Miller, which are interposed against his right to recover upon the injunction bond, are invalid and not binding upon Peter Miller. This appears so plain to us as to require neither argument nor elaboration. It is contended by counsel for appellees that the defense sought to be made against the counter-claims are such as could only have been made by Peter Miller, had he been in the plaintiff's position. In other words, it is claimed that the judgment and note although void are yet valid as to all the world except Peter Miller, and that plaintiff cannot attack them collaterally. But appellees lose sight of the thought that the plaintiff stands in the shoes of Peter Miller. He is asserting a right acquired from Peter Miller against which the law allows the defendants to set off any valid claim they have against Peter Miller. It would be a most unjust rule to hold that all claims set up as counter-claims must be accepted by the plaintiff as correct. The appellees contend that the judgment shows upon its face all the facts necessary to confer jurisdiction, and that, therefore, it cannot be collaterally attacked. We have not looked into this question, because the motion to strike the reply so far as the judgment was involved was not put upon the ground that the judgment was not void, but upon the ground that plaintiff had no right to question

The State v. Kelly.

the same in this case, because he was not a party thereto, and the court so determined.

There are other questions in the record. There are alleged errors in the rulings upon the admission of evidence and the apportionment of costs. Without discussing them in detail we deem it sufficient to say that we do not regard them as well taken. For the error above pointed out the judgment will be reversed and the cause remanded for a new trial.

REVERSED.

THE STATE V. KELLY.

57	644
118	539
57	644
121	568
57	644
126	474

1. **Criminal Law: POSSESSION OF STOLEN PROPERTY: PRESUMPTION.**
The recent possession of stolen property will authorize a conviction, unless the presumption of guilt arising therefrom is overcome by other facts; and it is immaterial whether it be termed a presumption of law, or a presumption of fact, as both are identical in meaning.
2. —: **TESTIMONY OF DEFENDANT: COMPETENCY OF.** The rules relating to the competency of testimony given by other witnesses, should be applied when the prisoner testifies in his own behalf; and the refusal to allow the prisoner to testify as to the statements of the person from whom he claimed to have received the property stolen, tending to show that he believed such person had the right to dispose of the same, was error.

Appeal from Cherokee District Court.

WEDNESDAY, MARCH 22.

DEFENDANT was indicted and convicted of larceny of a steer, the property of Peter Mathews, and sentenced to the penitentiary for the term of eighteen months. He now appeals to this court.

W. G. McConnell, for appellant.

Smith McPherson, Attorney-general, for the State.

The State v. Kelly.

BECK, J.—I. The evidence establishes, without contradiction, that defendant drove a steer in the night-time to the town of Cherokee, and in the morning sold it to one McConnell, a butcher. This was on the 18th day of September. On the 3d of October, Mathews discovered that a steer belonging to him, kept in a herd of one Coleman, about fifteen miles from Cherokee, was missing. For the stealing of this animal defendant was indicted. There was evidence tending to show that the steer sold by defendant was the one owned by Mathews, which had disappeared from the herd.

II. The court gave the following instruction to the jury:

"It is a rule of law that when property has been recently stolen and is shortly thereafter found in the exclusive possession of a party, such fact is *prima facie* evidence of the guilt of such party so found in possession, of the felonious taking of said property, unless to the jury such possession is satisfactorily explained. If, therefore, you find from the evidence herein that the steer, in the indictment described, was the property of Peter Mathews, that it was stolen from him on or about the 18th day of September, 1878, in this county and State, and if, further, the evidence shows that the defendant, Dennis Kelly, was in the possession of said steer, in this county and State, and sold the same to the witness, McConnell, within two or three days after the same was stolen, then such proof would warrant you in finding the defendant guilty, unless the testimony has, to you, satisfactorily explained that possession. But before a presumption of defendant's guilt would arise, and before you would, by reason of such possession, be warranted in finding defendant guilty, you must be satisfied that the same steer that defendant sold, was, when sold, the property of Peter Mathews, and had been, within a short time prior thereto, stolen from said Peter Mathews."

This instruction is complained of by defendant's counsel as being erroneous, on the ground that it directs the jury that the

The State v. Kelly.

recent unexplained possession of stolen property raises a presumption in law of defendant's guilt. Counsel insist that the presumption is of fact and not of law, and that the court erred in not so directing the jury.

The recent unexplained possession of stolen property tends to establish the guilt of the person in whose possession it is found, and will authorize conviction, unless the inference of guilt is overcome by other facts tending to establish the innocence of the accused. This presumption may be overcome by testimony establishing facts inconsistent with guilt. Good character may be sufficient in some cases to overcome the presumption. The law holds that the presumption in question, unless overcome, will authorize conviction. It is a presumption recognized by the law, and may, therefore, be termed a presumption of law. The term presumption of fact implies that from certain facts the law will raise a presumption. Either of these terms, presumption of law or presumption of fact, may be used to express the same thought, for they are identical in meaning. See *State v. Richart*, ante, p. 245; *State v. Hessians et al.*, 50 Iowa, 135; *The State v. Taylor*, 25 Iowa, 275. The instruction we think is correct.

III. The prisoner gave the following and other testimony in his own behalf. "I got that steer from Jim Garren's yard.

2. ———: testimony of defendant: competency of.

Garren lives about a mile southeast from our place. Garren hired me to take the steer. This was about two days, I think, before I took the steer. It was in the evening he hired me." Defendant then proposed to state the conversation had between himself and Garren at that time, but upon objection by the State the evidence was excluded, the court holding that the defendant could not testify to the conversation had with Garren, but it was competent for him to testify to the "arrangement" made between them. Thereupon the prisoner testified as follows: "Yes, there was an arrangement. I was to drive this steer down here from home, and get two dollars for driving it down

The State v. Kelly.

and selling it for him. I was to take the steer in a couple of days, and I did. I took the steer about one or two o'clock at night and Jim Garren helped me drive it part way. I got to town about daylight. I drove the steer to the barn, then went to Green's hotel; no one up, I called my brother; he got a rope and we tied the steer up. I sold the steer to Mr. McConnell for about \$24, and gave the money to Jim Garren that evening; I gave it all to him and he paid me \$2. * * * I did not get the steer at Coleman's herd; when I saw the steer at Garren's yard I did not know whose it was; he did not say; Garren selected the steer out of the yard to be driven here."

The rules relating to the competency of testimony given by other witnesses are applicable when the prisoner testifies in his own behalf, and the fact that the evidence against him is strong and his story improbable can have no bearing upon the question of the admissibility of the testimony proposed. We are to apply the rules recognized by the law without regard to the particular merits of the case before us.

In criminal cases all circumstances connected with a transaction tending to show the guilt or innocence of the accused, which bear upon its character and tend to disclose the *animus* of the parties, are regarded by the law as a part of the transaction itself, and are competent evidence. In the absence of a knowledge of such circumstances, incorrect and unjust conclusions may be reached touching the motives and intentions of the parties to the transaction. These attending circumstances are in the language of the law denominated *res gestæ*, and are always to be received in evidence and considered with the principal fact or transaction. The defendant's guilt in this case, in view of his own testimony, depends upon his knowledge that Garren had no right to the possession of the steer and that it was stolen property. If this element is not in the case he is innocent. He ought, therefore, to have been permitted to testify as to his knowledge upon this subject, de-

Leonard v. Lining.

rived from his conversation with Garren. If he was induced to believe by the declarations and statements of Garren, that he had a right to the possession of the steer and authority to employ defendant to sell it, and statements of Garren to that effect would be proper to consider in determining whether defendant entertained such belief, he was innocent of crime. Evidence of this character would have accounted for his possession of the stolen property. These conclusions are based upon the most familiar rules of evidence and are supported by the clearest reason. See *Muck v. The State*, 48 Wis., p. 271.

For the error in refusing to admit the evidence above considered the judgment of the District Court must be

REVERSED.

LEONARD V. LINING.

1. **Estate : DESCENT: RIGHTS OF PARENTS.** Where a child survived his father, but died without issue before the death of his grandfather, from whom the property was derived, it was held that he never had any vested estate in the property, and that his mother, surviving, would take nothing by descent. Parents succeed only to the estate which the child has at the time of his death.

Appeal from Wapello Circuit Court.

WEDNESDAY, MARCH 22.

THE plaintiff, as administrator of the estate of Moses Leonard, deceased, instituted this proceeding, praying an order barring the defendant, Mary Lining, from any right in said estate, and directing distribution to the representatives of Wilson Leonard, a deceased son of Moses Leonard, former husband of Mary Lining. The defendant, Mary Lining, claims that as the widow of Wilson Leonard she is entitled to one-

Leonard v. Lining.

third of the share of Wilson in the personal estate of Moses Leonard. She further claims the share of Francis M. Leonard, deceased, a son of herself and Wilson Leonard, who died before his father. The court allowed the claim of the defendant to the share of her deceased son, and denied her claim as the widow of Wilson Leonard.

Both parties appeal. The facts are stated in the opinion.

Hutchison & Tisdale, for the plaintiff.

No argument for the defendant.

DAY, J.—Moses Leonard died in 1878, leaving surviving him six children. Wilson Leonard, a son of Moses Leonard, died in 1852, leaving the defendant, his widow, and one daughter, and two sons, one of whom, Francis M. Leonard, died in 1864. From the statement it appears that both Wilson Leonard, the son, and Francis M. Leonard, the grandson, died before Moses Leonard, but that Francis M. Leonard was living at the time of the death of his own father, Wilson Leonard. The court allowed the defendant the share which would have gone to her son, Francis M. Leonard, if he had survived his grandfather. Section 2454 of the Code is as follows: "If one of his children be dead, the heirs of such child shall inherit his share in accordance with the rule herein prescribed, in the same manner as though such child had outlived his parents."

In order to properly apply this section to the facts of this case we must suppose Wilson Leonard to have outlived his father, Moses, and to have died subsequently to

1. ESTATE:
descent:
rights of par-
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1878. At that time Francis M. Leonard was dead, without issue. If Francis had left issue, a different question would be presented, as such issue might have become entitled to the share which would have fallen to their father if he had been living when Moses Leonard died. But sections 2455 and 2456 of the Code provide, in effect, that if the intestate leave no issue nor wife, his *estate* shall go to his

Leonard v. Lining.

parents, if living, and if one of his parents be dead, to the survivor. Now, under the doctrine of *Lash v. Lash*, 57 Iowa, 88, Francis M. Leonard never had any estate in this property. He died before the death of his grandfather, from whom the property is derived, and the property never vested in him. If the statute provided that if one of the children be dead without issue the share which would have gone to him, if living, should go to his parents, the parents would be placed upon the same ground as to inheritance as the children. But the statute does not so provide. It simply provides that in the absence of issue the estate of a child shall go to the parents. No provision is made that the parents shall take unless the intestate leave an estate. Francis M. left no estate, and hence there was nothing which his mother, under the statute, could take from him. As Francis M. Leonard was dead without issue when his grandfather, Moses Leonard, died, the share which would have gone to Wilson Leonard if he had survived his father must be distributed just as if Francis M. had never had any existence. The case of *Moore v. Weaver*, 53 Iowa, 11, is not inconsistent with this view. In that case the intestate died seized of an estate in fact.

As the defendant has submitted no argument, the errors assigned on her behalf are regarded as waived, and her appeal as abandoned. Upon the plaintiff's appeal the judgment is

REVERSED.

BRULEY V. ROSE ET AL.

1. **Pledge: LARCENY OF THE THING PLEDGED BY THE PLEDGOR.** Property was pledged as security for a debt. Afterward the pledgor obtained possession thereof for a special purpose, with the consent of the pledgee, and thereupon took the property out of the county, and there was evidence tending to show that the pledgor obtained possession of the thing pledged with the felonious design of depriving the pledgee of his security. *Held:*
 1. That the pledgee had a special property in the thing pledged.
 2. That if the pledgor obtained possession of the thing pledged by deception and false pretense, the pledgee could not be deemed to have released his lien or special property therein.
 3. That where the taking was with the felonious design to deprive the pledgee of his security, the pledgor would be guilty of larceny of the thing pledged.
2. **Malicious Prosecution: GUILT MAY BE SHOWN.** In an action for malicious prosecution the defendant may show the guilt of the plaintiff, under the general issue, especially when the guilt consisted of facts known to the prosecutor at the time; and where there was evidence from which the jury might have believed the plaintiff was guilty, though discharged by the examining magistrate, an instruction that the plaintiff was not guilty of the crime charged was erroneous.

Appeal from Hardin Circuit Court.

WEDNESDAY, MARCH 22.

ACTION for malicious prosecution. There was a trial by jury, and verdict and judgment were rendered for the plaintiff against the defendant Rose. He appeals.

Huff & Gilman, for appellant.

Allen & Bryson, for appellee.

ADAMS, J.—The defendant Rose filed an information before a justice of the peace of Hardin county, accusing the plaintiff Bruley of the crime of larceny. A warrant was issued and served by the defendant Waid, as special constable. A hearing having been had, Bruley was discharged. He brings this

Bruley v. Rose.

action for damages, averring that the defendants, knowing him to be innocent, maliciously caused his arrest and prosecution.

The information filed by Rose charged Bruley with the larceny of a span of horses. Rose was, at one time, the owner of the horses, and made a sale of them to Bruley under an agreement that they should be paid for in work, and in case they should not be paid for, Rose should have the right to take possession of them. The evidence tends to show that the work, which was to be done by Bruley in payment for the horses, was done by him substantially in accordance with the agreement. Bruley, however, upon a general settlement with Rose, was found to be in debt to him in the sum of \$45.60. To secure the payment of that sum, Rose claims that Bruley delivered the horses to him as a pledge, and afterward gained possession of them under false pretenses and with the felonious design of depriving him of his security. All this Bruley denies.

It is undisputed that he took the horses from Rose's farm in Hardin county, and removed them to Butler county, where he was using them at the time he was arrested. The evidence is quite strong that at the time of the settlement Bruley delivered the horses to Rose as security; and we think that there was at least slight, evidence tending to show that Bruley, if he had obtained the consent of Rose to his taking the horses at the time he took them, obtained such consent under a pretense of desiring to use them for a short time for a specific purpose, but without the design of using them for such purpose, or of returning them, but of depriving Rose of his security. Bruley, it appears, was at the time living with his family on Rose's farm. After the settlement, according to the testimony of two witnesses, he represented that he desired to use the horses to go to one Hayden's early the next morning, a distance of about eight miles, in a westerly direction, and Rose consented that he might take the horses for that purpose, and no other. The same night Bruley took the horses and started easterly, with his

Bruley v. Rose.

family and household goods. According to his own testimony he started in the night and traveled about nine miles and camped out, and reached New Hartford, Butler county, the next day. It appears certain that he did not go to Hayden's, and did not take the horses for that purpose, but for the purpose of proceeding in the opposite direction. The court gave an instruction, a portion of which is in these words:

"The plaintiff was arrested upon a charge of larceny. He was not guilty of the crime charged, but it was not essential that he should have been guilty to exculpate the defendants of the responsibility of the prosecution."

The defendants excepted to so much of the instruction as states that Bruley was not guilty of the crime charged.

The action of the justice of the peace in discharging Bruley is not conclusive evidence of Bruley's innocence; and if he was guilty he is not entitled to recover in this action. *Parkhurst v. Masteller*, ante, p. 474. If there was any evidence tending to show that Bruley was guilty of larceny, then it was error to instruct the jury that he was not guilty.

The plaintiff contends that a pledgor cannot be guilty of larceny of the thing pledged, and especially after he has obtained possession of the thing by the pledgee's consent.

Larceny consists in stealing, taking, and carrying away the property of another. Code, § 3902. It is said by the plaintiff that the title to a pledge remains in the pledgor, and that the interest of the pledgee in the thing pledged is not property.

There is, however, what is known as a special property, distinguishable from the general ownership. The doctrine is elementary that a bailee has a special property in the thing which is the subject of the bailment. *Belden v. Perkins*, 78 Ill., 449; *Woodman v. Nottingham*, 49 N. H., 347. A pledge is a species of bailment, and the rule as to a special property in the thing which is the subject of the bailment, in such case, is especially applicable thereto. *Lyle v. Barker*, 5 Binney, 457; *Hoy v. Riddell*, 1 Sandf., 248.

Bruley v. Rose.

We come next to inquire whether there was a subsisting pledge, at the time of the acts which are alleged to constitute the larceny. The plaintiff insists that there was not, because according to Rose's testimony he had consented that the plaintiff might take the horses. It is said that whenever a pledgee voluntarily releases the possession of the pledge his lien is lost.

It may be conceded that as a general rule possession is an essential element of a pledge. Schouler on Personal Property, 513. It was held, indeed, in *Bodenhammer v. Newson*, 5 Jones (N. C.), 107, that a pawnee by giving up the thing pawned, though for a special purpose, loses his lien as between himself and the pawnor. See, however, as holding a different doctrine, *Hutton v. Arnett*, 51 Ill., 198; *Haynes v. Reddell*, 1 Sandf., 243. What the rule is in the absence of any deception or false pretenses we need not determine. Rose consented only that Bruley should take the horses for the purpose of going to Hayden's, and the evidence was such that the jury would have been justified in finding that Bruley had no intention of using the horses for that purpose. Besides, the actual taking was in the night prior to the morning upon which he was to have the horses to go to Hayden's. In no sense could Rose be deemed to have released his lien *at that time*.

Having determined that, if the horses were pledged to Rose, as there was evidence tending to show, he had acquired a special property in them, and had not released his lien at the time they were taken, it only remains to be determined whether if the taking was with the felonious design of depriving Rose of his security Bruley was guilty of larceny. Our attention has been called to no case where it has been directly held that larceny of a thing pledged can be committed by the pledgor. But where a person has a special property in a thing which has been stolen, the property, in indictment for larceny, may be laid in the special or general owner. *State v. Quick*, 10 Iowa, 451; *State v. Somerville*, 21 Maine, 586; 3 Green-

 Bruley v. Rose.

leaf on Ev., Sec. 161; Wharton's Criminal Law, 659. The property may be laid in a bailee, even where he has parted with possession, if he did so by mistake. *Regina v. Vincent & West*, 9 Eng. L. & Eq., 548.

In *People v. Stone*, 16 Cal., 369, it was held that a bailor may be guilty of stealing his own property, if his intent was to charge the bailee with the property. See, also, *Palmer's Case*, 10 Wend., 165. We are satisfied that a pledgor may be guilty of stealing the thing pledged, and that there was evidence tending to show that Bruley committed such crime.

It is contended, however, that even if this is so Rose was in no condition to show such fact, because there is no averment of such fact in his answer. In an action for malicious prosecution the right on the part of the defendant to show the guilt of the plaintiff seems generally to have been recognized as existing under the general issue. Whether it could properly be so held, if the guilt consisted of facts, *not known* to the prosecutor at the time the prosecution was commenced, we are not called upon to determine. Bruley's acts were for the most part known to Rose. Having held that there was evidence tending to show that his acts were such that the jury might have believed that he was guilty of larceny, we have to say that it appears to us that if the jury did believe it, they might have found that there was enough known to Rose to justify him in believing it.

In our opinion the court erred in instructing the jury that Bruley was not guilty of larceny.

REVERSED. 4

2. MALICIOUS
prosecution :
guilt may be
shown.

Abbott v. Sartori.

ABBOTT V. SARTORI.

1. **Confession and Avoidance: PLEADINGS: SUFFICIENCY OF.** The allegations of the answer held to sufficiently confess the facts averred in the petition to permit the defendant to plead matters in avoidance.
2. **Sale of Liquors: MONTHLY STATEMENT: ACTION FOR PENALTY.** The provisions of section 4537, Code, that every person having a permit to sell intoxicating liquors shall make a return of his sales on the last Saturday of each month, as to the time of filing the return, are not mandatory. The statute is so far directory as to authorize the return to be filed at any time before an action is commenced for the recovery of the statute penalty.

Appeal from Black Hawk District Court.

WEDNESDAY, MARCH 22.

THE plaintiff alleges in his petition *that permission to buy and sell intoxicating liquors for the term of twelve months within Black Hawk county, as provided by chapter 6, title XI of the Code, was by the board of supervisors of said county, on the 9th day of January, 1879, granted, and on the 26th day of January, 1879, issued to the defendant Anton Sartori, and that he as principal, with other parties named, as sureties, executed a bond to said county for the use of the school fund, in compliance with the requirements of the statute, for the sum of three thousand dollars.*

Counts one to seven of the petition allege that in the month of February, and that in each of the succeeding months, the defendant made sales of intoxicating liquors to various persons, and that he did not, on the last Saturday of any of the months make to the auditor of said county any report in writing of said sales, nor any report showing the kinds and quantity of liquors sold, nor to whom sold, nor showing any of his doings as a purchaser, or sales of intoxicating liquors during said time.

The defendant, "for answer denies each and every allegation made and contained in plaintiff's petition, except such as are

Abbott v. Sartori.

hereinafter specifically admitted. The defendant further answering, states:

"1. That he admits that he made the sales of intoxicating liquors, substantially as stated in the first count of the petition, and admits that he did not file a report thereof on the last Saturday of the month of February, A. D. 1879, but the defendant avers that he did file a report thereof fully complying with the statute, on the 15th day of March, A. D. 1879, which said report shows all sales and purchases for the month of February, A. D. 1879, and including the sales mentioned in the said count of the petition."

In the other divisions of the answer, numbered from two to seven, the defendant admits that he made the sales substantially as stated in counts two to seven of the petition respectively, and that he did not file a report thereof on the last Saturday of each month, but that he did file reports, fully complying with the statute, for the month of March, on the 17th day of April; for the month of April, on the 21st day of May; for the month of May, on the 14th day of July; for the month of June, on the 14th day of July; for the month of July, on the 12th day of September; for the month of August, on the 12th day of September.

The plaintiff demurred to this answer. The demurrer was overruled. The plaintiff elected to stand upon the demurrer, and judgment was entered against her for costs. The plaintiff appeals.

Hemenway & Polk, for appellant.

J. J. Tollerton and Boies & Couch, appellees.

DAY, J.—I. The first point presented in the demurrer, and insisted upon in argument, is that the defendant does not in his answer so confess the facts, averred in the petition, as to permit him to plead matters in avoidance. It is insisted that the defendant does not admit that he executed a bond or sold un-

Abbott v. Sartori.

der a permit. The first count of the petition avers: "That the defendant at said county and State, from the 1st until the 22d day of February, 1879, under and by virtue of said permit, did engage in, and continue the sale at retail, of intoxicating liquors, and did then and there sell to divers persons, intoxicating liquors." The other counts of the petition contain the same averments as to the other months in question. The first count of the answer states that defendant "admits that he made the sales of intoxicating liquors, substantially, as stated in the first count of the petition." The other counts of the answer contain the same admission as to other counts of the petition. Here is a clear admission that the sale was under a permit. To the suggestion that the answer does not admit the execution of a bond, it may be said that the several counts of the petition do not all-ge the execution of a bond, unless what precedes the portion of the petition designated as count 1st, and which is indicated in the statement in italics, be incorporated into and regarded as a part of the several counts of the petition; and, if it be so incorporated and considered, it is admitted in the answer, for the admission is as broad as the allegation. We think this position of the appellant is not tenable.

II. The principal question in the case is whether the answer of the defendant shows that he has substantially complied with the statute. Section 1537 of the Code provides that every person having a permit for the sale of intoxicating liquors "shall make on the last Saturday of every month, a return in writing to the auditor of the county, showing the kind and quantity of the liquors purchased by him since the date of his last report, the price paid and the amount of freights paid on the same; also the kind and quantity of liquors sold by him since the date of his last report, to whom sold, for what purpose, and what price; also the kind and quantity of liquors remaining on hand, which report shall be sworn to by the person having the said permit, and shall be kept by the auditor, subject at all times to the inspection of the public."

Abbott v. Sartori.

Section 1538 is as follows: "Any person having such permit, who shall sell intoxicating liquors at a greater profit than is herein allowed, or who shall fail to make monthly return to the auditor as herein required, or shall make a false return, shall forfeit and pay to the school fund of the county the sum of one hundred dollars for each and every violation of the provisions of this chapter, to be collected by civil action upon his bond by any citizen of the county, before any court having jurisdiction of the amount claimed, and for the second conviction, under the provisions of this chapter, the person convicted shall forfeit his permit to sell." It is claimed by the appellant that this statute, so far as the time for filing the report is concerned is mandatory, whilst the appellee insists that it is merely directory.

The cases upon the question, under what circumstances a provision in a statute may be declared directory, and when it must be regarded as mandatory, are very numerous, and they are, perhaps, not all capable of reconciliation. In Cooley's Constitutional Limitations, page 73, it is said: "In respect to statutes it has long been settled that particular provisions may be regarded as *directory* merely; by which is meant that they are to be considered as giving directions which *ought* to be followed, but not as so limiting the power in respect to which the directions are given, that it cannot be effectually exercised without observing them. The force of many of the decisions on this subject will be readily assented to by all; while others are sometimes thought to go to the extent of nulifying the intention of the legislature in essential particulars." And upon page 77, the following language is employed: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt, conduct of the business, and by a failure to obey which, the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated,

Abbott v. Sartori.

it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly, or by necessary implication, forbid the doing of the act at any other time or in any other manner than as directed." In *Hinford v. The City of Omaha*, Grant, J., after a full review of the authorities upon the subject, lays down the rule of construction substantially as above indicated. In a note to Potter's *Dwarris on Statutes*, page 223, it is said: "When a statute directs a person to do a thing in a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered as directory to him, and not as a limitation of his authority."

This proposition is sustained by the following authorities: *The People v. Board of Supervisors*, 33 Cal., 487; *Pond v. Meyers*, 3 Mass., 230; *Ex parte Heath*, 3 Hill, 42; *The People v. Cook*, 14 Barb., 290; *The People v. Allen*, 6 Wend., 486; see, also, *Dawson v. The People*, 25 N. Y., 399; *Toney v. The Inhabitants of Milbury*, 2 Pick., 64. In *Hinford v. The City of Omaha*, 4 Neb., 336 (350), it is said: "When the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience, rather than substance, or when the directions of the statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory."

Applying the foregoing authorities to the question in hand, we are of opinion that the provision of the statute as to the time of filing the report designated is not mandatory, and that the statute may be substantially complied with, by filing the report after the time indicated. It is true that section 1538 of the Code provides for a forfeiture for the failure "to make monthly return to the auditor as herein required." But this, we think, applies to a failure in matters of substance, and not merely as to time. The primary object and substantial purpose of sec-

Abbott v. Sartori.

tion 1537 are to guard against sales for an unlawful purpose, and at a greater rate of profit than the law authorizes, and to furnish to the public the means of detecting violations of the law. Any person examining the reports in the auditor's office, after the last Saturday of a given month, and finding that anyone selling liquors under a permit had failed to make return of the liquors bought and sold by him, as required in section 1537, would be authorized at once to institute a suit for the collection of the penalty prescribed in section 1538, and, it is probable that the action could not be defeated by making a report after the commencement of the action. But if, before the commencement of the action, the report required in section 1537 is deposited with the auditor, though not deposited upon the very day required by the statute, there is, we think, a compliance with the statute in all matters of substance.

A report deposited after the day fixed in the statute furnishes the means of detecting violations of the law, and if in the meantime no action has been commenced, no one has suffered any substantial prejudice by the delay. The liability to action during the period that the report is wanting, will always furnish an incentive to make the report as promptly as possible. When this action was commenced the defendant had made report for every month for which the forfeiture is claimed, and had furnished all the information which the statute required. The object of the statute had been fully attained. The only complaint is that the reports were not filed on the last Saturday of each month. The statute, we think, is so far directory as to authorize the report to be made at any time before an action is commenced for the recovery of the forfeiture. It follows that, in our opinion, the demurrer was properly overruled.

AFFIRMED.

ADAMS, J., dissents as to last point.

Muir v. Blake.

MUIR V. BLAKE ET AL.

1. **Chattel Mortgage: UPON CROPS TO BE GROWN: VALIDITY OF.**
Whether a chattel mortgage, upon crops to be planted or grown by the mortgagor in the future, is valid, as against the creditors of the mortgagor, *quære*.
2. ———: **INDEFINITE DESCRIPTION OF MORTGAGED PROPERTY.**
Where the description of the property mortgaged was "all the crops raised by me in any part of Jones county for the term of three years," it is too indefinite and uncertain to charge third persons with notice of the mortgage.

Appeal from Jones District Court.

WEDNESDAY, MARCH 22.

ON the 15th day of January, 1879, James Crawford was in possession of certain improved land in Jones county, and on that day he executed to the plaintiff herein a chattel mortgage, that part thereof descriptive of the mortgaged property being as follows: "All the crops raised by me in any part of Jones county for the term of three years * * * ." The mortgage was recorded January 19, 1879. In the year 1879 Crawford raised a crop of corn on the premises of which he was in possession at the time of the execution of the mortgage, and in September, 1879, while he was still in possession, the defendant, Blake, who was at that time a judgment creditor of Crawford, caused an execution to issue upon his judgment and a levy thereof to be made upon the growing corn. The officer who made the levy required an indemnifying bond to be given him by Blake, and the defendant Crane became surety thereon. The officer sold the corn, and this action was brought upon the indemnifying bond to recover the value of the corn. Upon a trial to the court judgment was rendered for the plaintiff, and the defendant appeals.

Welch & Welch, for appellants.*Herrick & Doxsee*, for appellee.

57	662
83	570
57	662
87	594
57	612
121	752
57	662
131	225

Muir v. Blake.

ROTHROCK, J.—I. This case was submitted at a former term, and an opinion was filed affirming the judgment of the court below. A petition for rehearing was granted, upon which the cause has been more fully argued than it was at its first submission. After a thorough examination of the case in the light of the re-argument, we have reached a conclusion different from that heretofore announced.

In considering the case we will confine ourselves to the one question, as to the validity of this mortgage between the mortgagee and a creditor of the mortgagor. Whether or not it would be a valid and binding instrument between the parties to it, we need not consider, simply because the question is not presented by the facts in the case.

Nor will we now consider the question as to what crops, whether those which had been raised in Jones county, or those to be raised after the execution of the mortgage, are referred to therein. The plain meaning of the language above quoted from the mortgage, when taken in connection with the other provisions therein, is that it refers to crops to be raised thereafter.

Two questions are presented by counsel. The first is whether a mortgage is valid as against the creditors of the mortgagor upon crops to be planted and grown. In *Scharf-
1. CHATTEL
mortgage :
upon crops to
be grown :
validity of.* *cnburg v. Bishop*, 35 Iowa, 66, the mortgage was upon all the stock in trade of the mortgagor, and it contained this clause: "including any and all fixtures and stock now, or hereafter, kept in my said leather business, in the city of Keokuk, Lee county, and State of Iowa." The mortgagee placed the mortgage in the hands of the sheriff for foreclosure, who took possession of the stock in trade, including that which had been added after the mortgage was made, and a compromise was made between the mortgagor and mortgagee by which the latter took possession of all the property and credited the former with the agreed value. Afterwards other creditors attached the property in the hands of the mortgagee

Muir v. Blake.

and claimed that the mortgage, in so far as it covered after acquired property, was void. It was held that a mortgage which included property afterwards to be acquired was a valid and binding instrument. The same rule was recognized in *Brown v. Allen*, Id., 306; and in *Stephens v. Pence*, 56 Iowa, 257, the case of *Scharfenburg v. Bishop* was followed, the case being a controversy between the mortgagee and an execution creditor of the mortgagor's. In *Fejvary v. Broesch*, 52 Iowa, 88, it was held that where there was a lease of a farm for six years, a stipulation therein that rents due and to become due under the lease should be a perpetual lien on any and all crops raised on the farm * * * "whether the same be exempt from execution or not," was valid between the parties. The rights of creditors were in no way involved in the controversy.

It is to be admitted that the rule that property not in being may be the subject of a valid mortgage is opposed to the rule of the common law. *Scharfenburg v. Bishop*, *supra*; Herman on Chattel Mortgages, 86, and cases cited. And it will be observed that this court is not committed to the doctrine that a mortgage upon a crop to be planted and grown is valid as against the creditors of the mortgagors.

Whether or not there is any difference in principle between a mortgage upon crops to be planted and grown upon specific land, and the additions made to the stock of a merchant is a question somewhat discussed by counsel for appellant. It is claimed that in the former the property has no potential being or existence, while in the latter the additions to a stock of goods are merely accretions or incidents to the principal thing included in the mortgage. It is difficult to draw a clear or well-marked distinction. It is true it may be said that a stock of goods is in the nature of a continuing entity, though the articles composing the stock may change, while in case of a future crop, although the land has an existence, the crop has none, and the land not being mortgaged, there is much force in favor of applying the ancient rule that the grant of a thing

Muir v. Blake.

not in being is void. But we have no occasion to determine this question in this case, simply because we think it does not necessarily lie in our pathway in determining the rights of the parties:

II. The next question is whether the description of the mortgaged property is sufficient to charge third persons with notice of the mortgage. In *Smith & Co. v. McLean*, 24 Iowa, 322, it is said that a description of property in a chattel mortgage is sufficient if it is such as to "enable third parties, aided by inquiries, which the instrument itself indicates and directs, to identify the property covered by it." See, also, *Fant v. Harvey*, 55 Iowa, 421. It will be observed that in all the cases cited in *Smith & Co. v. McLean*, where the description was held sufficient, the locus of the property was described in such way that the instrument itself indicated where the property might be found by inquiry, such as all the "tools and chattels belonging to the mortgagor in and about a shop occupied by him," and all the property "now in the shop owned by me," and the like.

The mortgage which is in controversy in this action falls far short of any description to which our attention has been called. The mortgage itself does not suggest where the property may be found in Jones county. Whether upon premises owned or occupied, or in the possession of the mortgagor or any other named person. "All the crops raised by me in any part of Jones county for the term of three years," is a roving description, with nothing in the way of identification to suggest inquiry where the crops may be found, except the body of the county. One crop may be in one place in the county for one year in the three, and another place for another year, or there may be crops in different parts of the county for the same year, and all would be covered by this mortgage, if the description be held sufficient. A chattel mortgage ought not to be a drag-net covering a whole county in any such general terms. Upon the subject of indefinite and uncertain descrip-

 • Gear v. Schrei.

tions of property in a chattel mortgage, see *Pennington v. Jones*, decided by this court at last term, *ante*, p. 37.

These views lead us to the conclusion that the judgment of the court below should be

REVERSED.

GEAR ET AL. V. SCHREI ET AL.

1. **Voluntary Conveyance: BY INSOLVENT: EVIDENCE.** Where an insolvent paid the consideration for certain real estate, and procured the conveyance of the same to his wife, it was held not to differ from a voluntary conveyance made by a husband, while insolvent, to his wife; and that the property was properly subjected to the payment of the husband's debts.
2. **Chattel Mortgage: FORECLOSURE OF: GOOD FAITH.** Evidence of the foreclosure of a chattel mortgage and sale of the property considered; *held*, that no want of good faith or diligence on the part of the mortgagees was shown.

Appeal from Des Moines Circuit Court.

WEDNESDAY, MARCH 22.

ACTION to subject certain town lots, the title to which is in the defendant Caroline Schrei, to the payment of certain judgments held by the plaintiffs against the defendant Adolph Schrei, husband of Caroline Schrei. The lots were conveyed to Caroline Schrei by one Widick, but the plaintiffs aver that they were purchased of Widick by Adolph Schrei; that they were paid for by a consideration furnished by him, and were in fact his property. The defendants deny that the lots are the property of Adolph Schrei, and aver that they are the property of Caroline Schrei, and were paid for by a consideration furnished by her.

The defendant, Adolph Schrei, sets up a counter-claim.

The court held that the lots were the property of Adolph

57	666
96	113
57	666
110	420
57	666
111	569

Gear v. Schrei.

Schrei, and that the counter-claim was without foundation, and rendered a decree accordingly. The defendants appeal.

T. J. Trulock, for appellants.

Hammack, Howard & Virgin, for appellees.

ADAMS, J.—I. The evidence shows clearly that at the time of the execution of the deed of the lots by Widick to Mrs. Schrei, her husband was largely in debt and insolvent; that he owed the debts for which the judgments in question were rendered; that the trade for the lots was negotiated wholly by him; that Mrs. Schrei had no knowledge that a deed of the lots had been executed to her until long after it was done, and that the consideration received by Widick was the cancellation of certain indebtedness due from him to her husband. Her claim to the lots, if it has any support at all, is to be found in the testimony of her husband which is in these words: "I owed my wife \$350, which I used in my business. I turned these lots over to secure her."

But in our opinion the evidence does not show that he owed his wife anything. The pretended indebtedness arose by reason of the fact that Mrs. Schrei's father, one Steinmeyer, advanced to her husband \$350, of which he was to have the use during Steinmeyer's life, unless the money was needed by Steinmeyer, and in case it was not needed it should, at Steinmeyer's death, be regarded as an advancement to Mrs. Schrei. Steinmeyer is still alive. He has not parted with his claim to the money, and Mrs. Schrei has not yet acquired any right therein. The conveyance then does not differ in any essential respect from a voluntary conveyance made by a husband while insolvent to his wife. We think that the court correctly held that the plaintiffs were entitled to subject the lots to the payment of their judgments.

II. The counter-claim is based upon the alleged facts that

 Gear v. Schrei.

Adolph Schrei executed to the plaintiff a chattel mortgage to
 2. CHATTEL secure the judgments in question; that the plaintiff
 mortgage: mortgage: the plaintiff
 foreclosure: took possession of the mortgaged property,
 of: good and disposed of the same, and never fully ac-
 faith. counted therefor.

There was, at least in form, a foreclosure of the mortgage by a public sale of the mortgaged property to the plaintiffs. Schrei contends that the sale was not valid because the property was sold in bulk, and without being properly shown, and because it was understood between him and the plaintiffs that he was not concluded by the sale.

The arrangement between the parties appears to have been that the property should be offered in bulk; that the plaintiffs should bid thereon the sum of \$200; that if they became the purchasers Schrei should be credited with what the plaintiffs could realize in the disposition of the property. Both parties seem to have acted upon this agreement. Schrei has been credited between three and four hundred dollars.

Considerable evidence was introduced for the purpose of showing that the mortgaged property was worth more than was realized, and that it has not been properly disposed of. It is sufficient to say that upon a separate reading of the evidence we have all reached the conclusion that no want of good faith or diligence on the part of the plaintiffs has been shown.

In our opinion the decree of the Circuit Court is fully sustained and must be.

AFFIRMED.

THE STATE V. KNOWLES.

1. **Intoxicating Liquors: UNLAWFUL SALE BY REGISTERED PHARMACIST.** Where a registered pharmacist sold a pint of whisky to a stranger upon his mere statement that he wanted it for medicine, it was held that the court could well have found the liquor was sold as a beverage, in violation of the pharmacy law of 1880; and that a judgment of conviction would not be disturbed.
2. —: —. **JURISDICTION OF JUSTICE OF THE PEACE.** A prosecution under the pharmacy law of 1880, for the sale of intoxicating liquors as a beverage, is within the jurisdiction of a justice of the peace.

Appeal from Poweshiek District Court.

WEDNESDAY, MARCH 22.

AN information was filed before a justice of the peace charging that the defendant sold to W. Cullison intoxicating liquor. The defendant was convicted by the justice and appealed to the District Court, where he was again convicted, and appeals to this court.

John F. Lacey and *T. C. Reed*, for appellant.

Smith McPherson, Attorney-general for the State.

SIEVERS, CH. J.—The trial was had before the District Court without the intervention of a jury, upon an agreed statement of facts. No objection is made to the manner the case was tried in the District Court. The principal error relied on, in substance, is that the court erred in finding the defendant guilty under the facts agreed upon. The stipulation is as follows:

"1st. The defendant is a physician and registered pharmacist, and runs and keeps a drug store at Searsboro, in said county.

"2d. That on or about the 18th day of May, 1881, one William Cullison, a stranger to the defendant, called at defendant's

drug store and asked if they had whisky. The defendant said they had. Cullison then said he wanted a pint. The defendant told him he was

1. INTOXICATING liquors : unlawful sale by registered pharmacist.

not allowed to sell it except for medicine. Cullison replied that he needed it for medicine, that he was accustomed to taking it, and wanted it for medicine.

"The defendant then sold him one pint of whisky and he signed his name on a book kept by the defendant, showing that he got a pint of whisky for medicine. Said Cullison had no prescription from any physician. The defendant did not examine him or prescribe whisky for him, but simply sold it to him on his statement that he wanted it for medicine, in response to the defendant's statement that he could not sell it except for medicine.

"The only question is whether such a sale is in violation of law, or whether the pharmacy law authorizes or makes such sales lawful.

"The State claims it was merely an evasion of the law, or an attempt at evasion of the law, for the suppression of the unlawful sale of intoxicating liquors. The defendant claims that under the pharmacy law he has the right to sell whisky to any one who calls for it and says it is for medicine, unless he has reason to know that it is wanted for an improper purpose."

In 1880 the General Assembly passed an act to "regulate the practice of pharmacy and the sale of medicines and poisons." Miller's Code, page 950. It provides that registered pharmacists and "apothecaries * * * shall have the right to keep and sell under such restrictions as herein provided all medicines and poisons authorized by the National American or United States dispensatory and pharmacopœi as of recognized medicinal utility." It is, however, further provided it shall not be "lawful for any licensed or registered druggist or pharmacist to retail, or sell, or give away, any alcoholic liquors or compounds as a beverage."

Previous to and at the time of the passage of the foregoing act the sale of intoxicating liquors was absolutely prohibited except by a person duly licensed for that purpose. Code, §§

The State v. Knowles.

1523, 1526, 1540. It is insisted the act of 1880 repeals, or is so in conflict with the foregoing sections that the same, as to druggists, cannot be enforced, and that druggists now have the right to sell intoxicating liquor to any person who purchases the same for and as medicine; the argument being that the several dispensaries mentioned in the statute recognize such liquors as being of "medicinal utility," and therefore express power is conferred on druggists to sell the same. Conceding this to be so it is equally certain druggists cannot sell intoxicating liquors as a beverage. This being so, we turn to the agreed statement of facts, and therefrom conclude this was left a debatable or unsettled question to be determined by the jury, or rather, in this case, by the court. Certain facts are agreed upon which it may be said tend to show the liquor was sold as medicine, but the ultimate fact, whether sold as a beverage or medicine, is not agreed upon, but left open to be determined from the evidence, that is, facts agreed on.

We incline to think, it is true, liquors might be prescribed by a physician, and yet the circumstances surrounding the transaction might be such as to warrant the jury in concluding the liquor was sold as a beverage. Conceding a person may prescribe for himself and lawfully determine he should take intoxicating liquors as medicine, and that a druggist in such case may lawfully sell such liquor, it does not follow that it is always so prescribed or sold. It is undoubtedly true, the claim that it is taken as and sold as medicine may be a subterfuge, and that while in form sold as medicine, it was in fact a beverage, and so understood by both buyer and seller. The druggist must act in good faith, and the mere fact that a person says he wants intoxicating liquors as medicine will not exonerate the druggist, if the circumstances are such as to warrant the court or jury in concluding that in truth and in fact it was sold as a beverage. We have no means of knowing upon what ground the court below proceeded. But we are of the opinion that under the agreed facts the court could well

 Lawson v. The C., R. I. & P. R. Co.

have found the liquor was sold in fact as a beverage, and, therefore, under the settled practice, we cannot interfere with such finding.

It is urged the act of 1880 prescribes that the penalty for a violation of its provisions may be a fine of one hundred dol-

2. —: —: lars, and for "repeated violations" the name of
jurisdiction of justice. the offender shall be stricken from the register.

It is urged that a justice cannot fine an offender in a greater sum than one hundred dollars, and, therefore, because of the additional penalty, the justice of the peace did not have jurisdiction of this prosecution. We think this claim is unsound, because the justice did not have the power to strike the name of the defendant from the register. Besides this, this offense is the first violation of the act committed by the defendant.

AFFIRMED.

LAWSON V. THE C., R. I. & P. R. Co.

1. **Railroads: NEGLIGENCE: SPECIAL FINDINGS: INSTRUCTION.** Several cattle were killed and injured by separate trains of defendant. In an action for the entire damage the defendant asked for special findings as to the amount of damage done by each train. The court submitted the questions with an instruction that if the jury found that damage was done by both trains, and that one train was operated with reasonable care, then they should answer the questions. No special findings were returned with the general verdict, whereupon the defendant moved to require the jury to return answers to the questions, which motion was overruled. *Held*, that the instruction was correct and the motion properly overruled; that under the general verdict the questions asked became immaterial; and that the statute, section 2308, Code, does not require special findings of immaterial facts.
2. —: —: **EVIDENCE: SUFFICIENCY OF TO SUSTAIN VERDICT.** Where the evidence of negligence does not show such an absence of proof as to authorize the conclusion that the verdict was the result of passion or prejudice, the judgment will not be disturbed.

57 672
83 337
57 672
103 319

Appeal from Wayne Circuit Court.

THURSDAY, MARCH 23.

ACTION to recover the value of certain cattle killed by trains upon defendant's railway at the crossing of a public road. There was a judgment upon a verdict for plaintiff; defendant appeals.

Vermilion & Vermilion, for appellant.

E. S. Hart, for appellee.

BECK, J.—I. The evidence introduced at the trial of this case, in the court below, shows that a freight train upon defendant's railroad struck and killed, or injured, at the crossing of a highway, two or three cattle belonging to plaintiff. These cattle were a part of a drove of 140 or 150, which at the time were at or near the crossing. The cattle, after the accident gathered in great numbers upon the crossing, being attracted by the blood from the animals which were killed or injured. A passenger train followed in close proximity to the freight train and ran into the herd gathered upon the crossing, killing and injuring six or seven more. It does not clearly appear from the testimony what number was injured by each separate accident, but it is shown that by both, seven were killed and two injured. There is no dispute as to the facts thus far. The contention involves the question of negligence on the part of defendant, the evidence bearing upon this branch of the case being conflicting.

II. The defendant requested the court to submit the following questions to the jury for special findings: "How many cattle were killed by the freight train, and what were they worth? How many cattle were injured by the freight train, and what was the damage done to them? How many cattle were killed by the passenger train, and what were they worth? How many cattle were injured

I. RAILROADS: negligence: special findings: instructions.

Lawson v. The C., R. I. & P. R. Co.

by the passenger train, and to what amount were they damaged?"

The interrogatories were submitted under the following instruction:

"12. If you find from the evidence that both defendant's said freight train and passenger train struck and injured plaintiff's cattle, and if you further find that said collision was caused by the negligence of defendant's employes operating one of said trains, but that the other train was operated with reasonable care at the time, then you will answer the following special questions."

Under the instruction the questions were not answered by the jury. When the verdict came in the defendant's counsel moved the court to require the jury to retire and return special findings in response to the questions. The motion was overruled. The action of the court in overruling this motion, and in directing the jury touching their special findings by the instruction just quoted, is the first ground of complaint urged upon our attention by defendant's counsel.

We think the instruction in question is correct. There could no benefit or advantage result to defendant, in case the jury should find that there was negligence in running both trains, to determine the value and number killed or injured by each. In such case the special questions were immaterial, and therefore the court properly refused to require an answer thereto. The statute, Code, section 2808, relied upon by defendant's counsel to support his position, cannot be construed to require special findings of immaterial facts.

The jury having in the general verdict necessarily found defendant guilty of negligence in running both trains, for the reasons just expressed, it becomes immaterial to determine the number and value of the cattle injured by the separate accidents. The motion, after the verdict, for special findings was properly overruled.

III. Counsel for defendant insist that the evidence fails to

Slocumb v. The C., B. & Q. R. Co.

support the finding of the jury to the effect that defendant was
 2. —: —: chargeable with negligence. It cannot be fairly
 evidence: sufficiency of. claimed that there was such absence of proof upon
 this point of the case, as to authorize the conclusion that the
 verdict was the result of prejudice or passion. The testimony
 shows that for at least one hundred rods the crossing, and the
 space adjacent, were in plain view of the engineers and others in
 charge of the approaching trains. One hundred and forty or
 fifty cattle were collected near the crossing, some of them upon
 it, as the passenger train came up. There was evidence tend-
 ing to establish that efforts, dictated by ordinary care, were not
 used to stop or check the speed of the train. The collection
 of so great a number of cattle near a crossing was a source of
 danger and the persons in charge of the train were sufficiently
 warned of the danger by seeing the cattle there. If these per-
 sons did not see the cattle, the case is not different, for by the
 exercise of ordinary care and watchfulness they could have
 seen the animals. We conclude that the judgment cannot be
 disturbed on the ground that the verdict lacks the support of
 the evidence.

No questions, other than those we have considered, are dis-
 cussed by defendant's counsel. The judgment of the Circuit
 Court is

AFFIRMED.

SLOCUMB V. THE C., B. & Q. R. CO.

1. **Railroads: RIGHT OF WAY: LANDS CONVEYED SUBJECT TO.** Premises
 adjacent to a railroad were conveyed to plaintiff, "subject to any right
 of way, said railroad may own over the same." The railroad company
 had previously become entitled to thirty-five feet in width from the
 center line of its track as right of way, but there was nothing of record
 showing the extent of such easement. The railroad was in operation
 at the time, and a fence had been constructed on one side near the track.
Held, that plaintiff was advised by the presence of the railroad and the
 recitals in the conveyances that the railroad company claimed a right

87	675
99	658

57	675
120	586
4120	729
1122	196

57	675
138	430

57	675
140	376
140	377

Stocumb v. The C., B. & Q. R. Co.

of way over the premises, and by inquiry could have learned the extent of that right; and that she must be regarded as having notice of all the facts which due and timely inquiry would have elicited.

2. —: —: ADVERSE POSSESSION. Under the facts in this case the plaintiff being affected with notice of the acquisition of an easement over the premises by the railroad company, could not acquire title to any portion of the right of way by adverse possession.
3. —: DIVERSION OF COURSE OF STREAM: ESTOPPEL. Where the plaintiff stood by and saw the defendant at great expense divert the course of a small stream, which previously had touched the corner of her premises, without objection, until the work of such diversion had been completed, she will not be entitled to a mandatory injunction restoring the stream to its original channel:

The rule: "He who is silent when he ought to speak will not be heard to speak when he ought to keep silent," applied.

Appeal from Des Moines District Court.

THURSDAY, MARCH 23.

ON the 19th day of June, 1880, the plaintiff filed her petition alleging that she is the owner of a tract of land containing two and 40-100 acres, and that the B. & M. R. R'y Co and its successors, the C., B. & Q. R'y Co., have operated a railway adjacent to said premises for the past twenty-five years; and that the defendant, the C., B. & Q. R'y Co., has entered upon and threatens to use for railway purposes a strip of said premises of the width of about twenty-one feet, and of the length of about three hundred and fifty feet, without the consent, and without any effort to secure any right of the plaintiff. The plaintiff prays for an injunction to restrain the defendant from using, entering upon, or in any manner interfering with the land of plaintiff.

On the 15th day of November, 1880, the plaintiff filed an amendment to her petition alleging, that defendant has threatened, and is about to permanently divert Hawkeye Creek, a natural stream of water that has always flowed over said land of plaintiff, and to accomplish said diversion defendant has cut a new channel for said creek opposite to the land

Slocumb v. The C., B. & Q. R. Co.

of plaintiff, and filled in the bed of the creek at a point just above the plaintiff's premises, whereby the plaintiff is deprived entirely of the flow of said water on her premises. The plaintiff prays that an injunction may be granted to restrain said defendant from diverting and turning said channel in Hawkeye Creek off from plaintiff's premises. The court entered a decree giving to the plaintiff the right of possession of the strip of ground in controversy, and enjoining the defendant from interfering therewith, without first making compensation as required by law, and dismissing the plaintiff's petition as to the relief asked for the diversion of Hawkeye Creek, and ordering that the plaintiff be left to her remedy at law. Both parties appeal.

T. C. Whitely and P. Henry Smyth & Son, for plaintiff.

Hall & Huston and J. W. Blythe, for defendant.

DAY, J.—I. Prior to 1858 C. Range and G. C. Wilhelm owned certain land, embracing the premises in controversy, and agreed in parol to allow the B. & M. R. R'y Co. a right of way seventy feet wide over the same, in consideration of certain acts to be performed by said railway company. Under this agreement the railway company entered upon said land and constructed its road over it. A fence was constructed about fourteen feet from the center line of the railway, but the evidence does not show by whom this fence was built. Afterward Wilhelm and Range commenced an action against the B. & M. R. R'y Co., alleging that it had failed to perform the conditions of its agreement, and claiming \$3,000 damages. The trial resulted in a judgment in favor of the plaintiff for \$449, which the B. & M. R. R'y Co. paid. In 1868 the executor of the estate of G. C. Wilhelm conveyed an undivided half of the property in controversy to the plaintiff and C. Range, describing it as running to the center of the B. & M. R. Railroad, and thence along said railroad one chain

.RAILROADS:
right of way:
conveyance
subject to

Slocumb v. The C., B. & Q. R. Co.

and fifty links, containing 2 and 40-100 acres, "subject to any right of way said railroad company may own over the same." In 1869 C. Range conveyed an undivided half of said premises to the plaintiff, describing it as above, "subject to right of way of said railroad company." The plaintiff went into possession of said premises in 1869, under these conveyances, and has continued in possession ever since. The front of these premises was about fifteen feet above the grade of the street. The plaintiff caused the earth to be removed from the front, and taken to the rear of the premises, raising them about four feet on the side next to the railroad. Upon this the plaintiff planted raspberry bushes and cherry trees, and had an asparagus bed and a pie-plant bed. The defendant, the C., B. & Q. R'y Co., succeeded to the rights of the B. & M. R. R'y Co., and, in June, 1880, moved the fence in upon the plaintiff's inclosure twenty-one feet, and proceeded to construct an additional railway track. It is to restrain the construction of this track that this action is, in part, instituted.

As against Wilhelm and Range, it cannot be doubted that, by their parol license, and the B. & M. R. R'y Co.'s entering upon the land and constructing its railway, and the subsequent payment of the damages assessed on account of its failure to perform its agreement, it acquired a right of way thirty-five feet in width from the center of its track. The easement which the railway company thus acquired was obtained by contract, and though resting in parol could not be revoked by Wilhelm and Range. Washburne on Easements and Servitudes, page 24, and cases cited in notes.

When the plaintiff acquired her interest in the property from the estate of Wilhelm and Range, the fence stood within fourteen feet of the railroad track, and there was nothing upon record from which the extent of the easement could be determined. The plaintiff, however, was advised by the presence of the railroad, and by the recitals in the conveyances of the property to her, that the railway company claimed a right of

Slocumb v. The C., B. & Q. R. Co.

way over the premises, and the property was conveyed to her subject to that right. The plaintiff was also advised by the law that this right of way might extend to the width of one hundred feet, or fifty feet from the center of the railroad track. Having this information, and being thus affected with notice, it was the duty of the plaintiff to inquire of the railroad company what right it claimed in the premises. If the plaintiff had made this inquiry she would have ascertained that the railroad company claimed a right of way extending thirty-five feet from the center of its track. She must be regarded as having notice of all the facts which due and timely inquiry would have elicited. *Marratt v. Deihl*, 37 Iowa, 250.

The plaintiff insists that her right to the strip in question has become absolute by adverse possession. She relies upon 2. — : — : the case of *Davies v. Heubner*, 45 Iowa, 574. In adverse possession. that case no portion of the width of the road had ever been opened or used from the time the road was established, in 1846, until the institution of the suit, a period of thirty years, and the plaintiff had fenced and been in the actual use of one-half of the width of the road for a period of more than ten years. The decision is grounded mainly upon the fact that no portion of the road had ever been used. It is apparent that the case is not at all analogous to the one at bar, in which the railroad company constructed its road prior to 1858, and has ever since continued to occupy and use a portion of the width of its right of way. There can be no difference in principle, in the application of the statute of limitations, in the case of a party affected with notice of the acquisition of an easement by an irrevocable parol license, and the application of such statute to an easement acquired by grant or deed.

In *Barlow v. The C., R. I. & P. R'y Co.*, 29 Iowa, 276, a right of way was conveyed by deed to the M. & M. R'y Co. in 1853, which the C., R. I. & P. R'y Co. acquired in 1866, and then constructed its road. It was held upon demurrer to the

 Slocumb v. The C., B. & Q. R. Co.

answer that the right of way was not affected by non-user, and that the statute of limitation did not bar the defendant's right, notwithstanding the fact that the answer alleged that the lands over which the right of way was claimed, during this whole period of thirteen years, had been fenced and used for agricultural purposes. This case, it seems to us, is decisive, that the defendant's right to the twenty-one feet in question is not barred by the possession of the plaintiff. The plaintiff's possession was not adverse to, nor inconsistent with, the right of defendant to occupy the whole right of way, whenever it became necessary or desirable for it to do so. See *Yeakle v. Nace*, 2 Whart., 123; *Smyles v. Hastings*, 22 N. Y., 217; *Fox v. Hart*, 11 Ohio, 414. In our opinion the court erred in restraining the defendant from the use of the strip of and in question.

II. The property in question is situated within the corporate limits of the city of Burlington. Hawkeye Creek flowed through the city, touching upon a corner of plaintiff's premises. The railroad company crossed this creek on two bridges, one near to plaintiff's premises, and the other about six or seven hundred feet therefrom. The railroad company has filled in the bed of the creek at these two crossings, and turned the channel of the creek along the side of the railway most remote from plaintiff's premises, so that the bridges are dispensed with, and the creek does not touch the plaintiff's property. The evidence shows that Hawkeye Creek does not furnish a steady flow of water that is fit for use; that it has no value for manufacturing purposes, but that it is a small stream at all times when not swollen by freshets, hardly worthy of the name of creek, except in wet times, and is simply a kind of sewer for the water of the hills, having considerable swell at times, but that during rains it sometimes attains big proportions, becoming an enemy that has to be guarded against, and that the property was benefited by the change. The work of changing the creek was com-

t. — : di-
version of
course of
stream: estop-
pel.

Slocumb v. The C., B. & Q. R. Co.

menced in June, and finished on the 10th day of September, 1880, at a cost of \$5,302.92. Although this action was commenced on the 19th day of June, 1880, it was not until the 15th day of November, after the work had been fully completed, that the amendment to the petition was filed asking relief on account of the changing of the channel of the stream. The plaintiff insists that she is entitled to a mandatory injunction, compelling the defendant to restore the stream to its original channel. The plaintiff relies mainly upon the cases of *Corning v. The Troy Iron & Nail Factory*, 40 N. Y., 191 (1 Hand), and *Pugh v. Golden Valley R'y Co.*, 10 Reporter, page 349. In *Corning v. The Troy Iron & Nail Factory*, a mandatory injunction was allowed requiring the restoration of a stream to its natural channel, notwithstanding the fact that the defendant had, with the knowledge and express approval of the plaintiff, constructed works of a permanent and expensive character for the diversion of the stream, and was operating extensive machinery on its own land by means of such diversion. In this case, however, the stream was of the capacity of twenty horse power, and was valuable for manufacturing purposes, and the defendant owned the land upon one side of the stream, and had a lease from the plaintiff of the land on the other side of the stream for thirty-nine years, which had thirteen years to run when the diversion was made. The decision is placed upon the express ground that the plaintiff could not object to the diversion during the continuance of the lease, and that, whatever express assent he gave must have been understood by the defendant as applying only to the remainder of the term of the lease. In *Pugh v. Golden Valley R'y Co.*, *supra*, relied upon by plaintiff, the following language is employed by the court: "We entertain no doubt that the defendant's operations have a substantial diversion or operation in the course of the river, and that the plaintiff has thereby sustained an injury of such a character as to entitled her to an injunction, unless, either by any con-

Slocumb v. The C., B. & Q. R. Co.

sent on her part she has precluded herself from claiming it, or from the nature of the works completed by the defendants before objection, the case is one in which the court would refuse a mandatory injunction to restore things to their former condition; or, lastly, the defendants can justify what they have done under their statutory powers. There is no ground for imputing any laches to the plaintiff in the matter of her complaint. Upon the evidence it must be taken that she was unaware of the proposed interference with the river until the works which resulted in such interference were completed; and the delay between the time of her becoming aware of the interference and the commencement of the action is fully accounted for by negotiations for an amicable settlement of the dispute between her and the defendants which filled up that period."

It is apparent that these cases are not applicable to the facts of the present case. The plaintiff stood by and saw the work of diversion progressing, and it was not until after it was fully completed, at a cost of more than five thousand dollars, that she made any objection. The facts of this case bring it squarely within the principle announced by the master of the rolls in *Rochdale Canal Company v. King*, 16 Beavan, 630, "that if one man stand by and encourage another, though but passively, to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterward be interposed in the way of his enjoyment, the court will not permit any subsequent interference with it, by him who formally promoted and encouraged those acts, of which he now either complains or seeks to obtain the advantage." This principle, which is so obviously just as at once to command universal assent, is sustained by the following authorities: *The Erie Railway Company v. Railway Company*, 21 N. J. Eq., 283; *Greenhalgh v. Manchester Railway Co.*, 3 Mylne & Craig, 784; *Williams v. The Earle of Jersey*, 1 Cr. & Ph., 91; *Murphy v. Mayor*, 10 Rep., 765; *B., C. R. & M. Ry*

Baldozier v. Haynes.

Co. v. Stewart, 39 Iowa, 267; *Patterson v. Baumer*, 43 Iowa, 477. This principle is tersely expressed in the following maxim: "He who is silent when he ought to speak, shall not be heard to speak when he ought to keep silent." The court did not err in refusing to grant a mandatory injunction for the restoration of the stream. The cause is, upon the plaintiff's appeal, affirmed, and upon the defendant's appeal,

REVERSED.

BALDOZIER V. HAYNES ET AL.

1. **WILLS: ACCEPTANCE OF BY WIDOW: ENTERED OF RECORD: EVIDENCE OF.** The acceptance by a widow of the provisions of a will, in lieu of dower, in order to be binding upon her, under section 2452 of the Code, must be made within six months from the time she received notice of its provisions; and such acceptance must be entered in the proper records of the Circuit Court and be evidenced by such record, and no other evidence thereof is sufficient or competent. A written notice of acceptance, not entered of record, is not sufficient.
2. —: —: **ESTOPPEL: DISTRIBUTIVE SHARE.** Where the widow filed a written notice of her acceptance of the provisions of the will, but her consent was not entered of record, she would not be estopped thereby from claiming her distributive share in her husband's estate.

Appeal from Henry Circuit Court.

THURSDAY, MARCH 23.

ABRAM HAYNES departed this life in June, 1877. His last will and testament was admitted to probate in August thereafter. The plaintiff is his widow and brought this action to have set apart to her one-third of the real estate, of which the said Abram died seized, as her distributive share. There was a demurrer to the several answers of the defendants which was sustained, and the defendants appeal.

H. & W. Scofield, for appellants.

Woolson & Babb, for appellee.

57	683
80	358
57	683
97	707
57	683
1115	310
57	683
126	451
57	683
137	385

 Baldozier v. Haynes.

SEEVERS, CH. J.—It was alleged, in the answers among other things, that the will of Abram Haynes contained the following provisions: “I devise and bequeath to my beloved wife Elizabeth Haynes, for and during her natural life, or so long as she remains my widow, all my estate, both real and personal. * * * After the decease of my said wife, should she survive me, or in the event of her marriage, I direct that all my property, both real and personal, be sold at public or private sale, as my executors shall find most advantageous to the estate.” It was further alleged in the answers that the plaintiff was one of the executors named in the will and had full knowledge of its contents. That she took possession of the personal estate under the will and thereafter married her present husband. That before her said marriage, but in contemplation thereof, she executed the following writing: “In the matter of the estate of Abram Haynes deceased, in Circuit Court of the State of Iowa, in and for the county of Henry. Notice is hereby given that I accept the provisions of the last will and testament of Abram Haynes, deceased.” After the plaintiff’s marriage the defendants, in reliance on the said writing, expended money in improving the real estate and advertising the same for sale under the provisions of the will. It is further alleged that the real estate had been sold, and the deeds were, at the time the answers were filed, before the court for confirmation. The question to be determined is whether, under the facts above stated, the plaintiff is entitled to the relief demanded.

It will be conceded the relief asked is inconsistent with and will render nugatory an express provision of the will, and that the plaintiff has in writing consented to and accepted the provision made for her in the will. But the question remains, whether, under the statute, the writing can be regarded as sufficient or competent evidence of such fact. The provision of the statute is as follows: “The widow’s share cannot be affected by any will of the deceased, unless she consents thereto within

1: WILLS: ac-
ceptance of
by widow:
record: evi-
dence of.

Baldozler v. Haynes.

six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the Circuit Court." Code, § 2452. If the entry of record is essential and constitutes the only competent evidence a widow consents to the will and accepts the same in lieu of her distributive share, such entry must be made within six months from the time she receives notice of its provisions. The entry within the time aforesaid is just as essential as the record itself. The theory of the statute being that, as the entry affects the title to real estate, it should appear of record in the Probate Court to the end that all parties can readily know and understand the situation and title, and thus be able to purchase the same without doubt as to what they would obtain. If the entry of record has been made as contemplated by the statute, the widow and heirs, creditors and others, know their respective rights; and if it has not been made, there cannot be any uncertainty as to their rights.

When the foregoing statute was reported by the Code commissioners it contained a provision that the widow's share should not be affected by her husband's will "if within six months after his death she files in the clerk's office a renunciation of all rights conferred on her." This contemplated there should be a writing filed; it was not essential, however, that it should be otherwise made of record. The change made by the General Assembly under the circumstances appears significant as to the purpose and intent. The statute, as it now stands, does not make it essential there should be a writing signed by the widow. The essential thing is that such consent shall be evidenced by the record. Such consent may, without doubt, be orally expressed in open court and entered of record, the statutory thought being that where the widow so appears, and her consent is entered of record, she cannot afterward be permitted to contradict or impeach the record, and thus all doubt as to her rights and the rights of others will be at an end.

 Baldozier v. Haynes.

We must not be understood as intimating that the consent of the widow can only be expressed by her personally appearing in court. No such question is before us, and all we do hold is that an entry of such consent must appear on the records of the court, and that no other evidence is competent or sufficient. The circumstances above stated, together with the plain and express language of the statute, so clearly show the legislative intent that the statute cannot be regarded as merely directory.

Nor can it be said the plaintiff is estopped by the writing executed by her and the action of the defendants in reliance thereon. The latter have no right to rely on the writing. They were bound to know the law and that, under the statute, it was insufficient and not competent evidence the plaintiff accepted the provisions of the will.

The guardian *ad litem* of the minor defendants pleaded, in connection with the defenses held insufficient, a general denial of the allegations of the petition. It is claimed the demurrer was to, and was sustained to, the whole answer. We do not so understand the record.

The demurrer was sustained only as to the special defenses, and under the issue remaining the plaintiff introduced evidence and proved her case.

AFFIRMED.

REUSCH ET AL V. THE C., B. & Q. R. Co.

LONG ET AL V. THE SAME.

1. **Practice: REINSTATING EVIDENCE.** To justify the court in reinstating the evidence in a case, after it has once been stricken out for the reason it did not appear the evidence had ever been certified, it should at least be shown that it was duly certified within the time required by statute.
2. **Eminent Domain: PUBLIC USE: DIVERTING COURSE OF STREAM.** A railroad company may, under chapter 191, laws of 1880, condemn land for right of way for a channel and change the course of a stream, where the safety of the traveling public would be promoted thereby. For such object the land would be taken for a public use, authorizing the exercise of the right of eminent domain, and for that purpose the statute is not unconstitutional. Whether such right exists where merely the convenience and economy of the company would be promoted, not determined.

Appeals from Des Moines District Court.

THURSDAY, MARCH 23.

THESE causes are submitted together as arising upon substantially the same state of facts and involving the same questions of law.

The plaintiffs seek to enjoin the defendant from changing the course of a certain stream of water known as Hawkeye Creek. The defendant claims the right to change the course of the creek under chapter 191 of the laws of 1880, Miller's Code, page 357. The court dismissed the plaintiffs' petitions and they appeal.

P. Henry Smyth & Son and *T. C. Whitely*, for appellants.

Hall & Huston and *J. W. Blythe*, for appellee.

ADAMS, J.—The defendant has operated its road over its present track for many years. The plaintiffs are the owners of a small tract of land adjacent to the defendant's right of way. Hawkeye Creek crosses this land, and then crosses the

Reusch v. The C., B. & Q. R. Co.

railroad track, and after flowing a certain distance (it does not appear how far), it crosses the track again at a point about six hundred feet from the first crossing and returns again upon the plaintiffs' land. Wooden bridges were constructed at the crossings. Having been in use for a long time they were becoming unsafe, and it had become necessary to construct new bridges, or to obviate the necessity of bridges by cutting a channel along the plaintiffs' land and turning the creek through it. The company elected to adopt the latter course. To enable itself to cut such channel it proceeded, under the statute above cited, and caused to be condemned a strip of the plaintiffs' land. It paid the damages assessed, cut the channel, changed the course of the creek, took out the bridges and made a continuous embankment.

The plaintiffs contend that the defendant had no power to cause the land to be condemned; that the statute under which the proceedings were had is unconstitutional, and besides, that if it were constitutional, the case is not such a one as the statute contemplates. That part of the statute upon which the questions arise is in these words:

"SECTION. 1. In all cases where a railroad corporation, owning or operating a line of railroad within this State, would have the right, at this time, by procuring the right of way from the land-owner to dig a channel or cut a ditch in such a manner as to change and straighten the course of a stream too frequently crossed by its road, or to protect the right of way and road-bed, or promote the safety and convenience of the operation of the road, such railroad company may condemn the right of way as provided in the next section.

"SEC. 4. The true intent of this act is not to create in favor of a railroad corporation any additional right to divert a water-course from its natural channel, but simply to give the right to condemn the land necessary for the right of way in all cases where, by conveyance to the railroad corporation, it would have the right to dig such channels or ditches."

 Reusch v. The C., B. & Q. R. Co.

Private property can be taken only for public use. The plaintiffs contend that the property in question was not taken for public use. They say that the evidence shows that it was taken merely for the private advantage of the defendant, it being less expensive to pay the assessed value of the land, and cut a ditch and straighten the stream, than to maintain two bridges.

1. PRACTICE:
reinstating
evidence.

It is not denied by the defendant that it was influenced by motives of economy, but it is insisted that the removal of the bridges, and construction of a continuous embankment, makes the road safer for the traveling public, and so it is said the use of the land taken is a public use.

Whether the road now is any safer than it was before is a question upon which the parties are not agreed; and we have to say that the question is not presented in such a way that we can properly determine it. The evidence was, on motion of the appellee, stricken out. It did not appear, at the time the motion was filed and ruled upon, that the evidence had ever been certified. It is true that a motion is now made to reinstate the evidence, and it is shown that the evidence is now certified. But it is not shown *when* it was certified. To justify us in reinstating the evidence, after it has once been stricken out, it should at least be shown to us that the evidence was certified within the time required by statute.

But it is insisted by the plaintiffs that, in the nature of the case, the land could not properly be said to be taken for public use. They say that the mere promotion of the safety of the traveling public is not a public use in such a sense as to authorize the exercise of the right of eminent domain. Their position is that to authorize the exercise of such right, the use must be necessary to the public, and they say that this court has held in *Stodghill v. C., B. & Q. R. Co.*, 43 Iowa, 31, that "such reasonable degree of safety as the public requires is secured upon railroads with bridges as well as without."

2. EMINENT
domain:
public use:
diverting
course of
stream.

Reusch v. The C., B. & Q. R. Co.

The public certainly travels upon railroads with bridges, and it would probably be difficult to show that an unusually large number of bridges in a given road has much, if any, tendency to divert the travel to other roads. We thought, therefore, in the case above cited, that a railroad company, in applying for the assessment of damages for a right of way, cannot ordinarily be presumed to apply for the right to divert a natural stream of water. Our idea as to what the traveling public requires, as indicated by what it does, cannot be allowed much influence in the determination of the question now before us. The traveling public incurs many dangers which doubtless, in the progress of science and legislation, will eventually be obviated. The statute in question is based in part upon the theory that the safety of the traveling public can sometimes be promoted by turning the course of a stream, and by saving thereby one or more bridges. That this theory is correct we have no doubt. We do not say that a bridge might not be built which would be as safe as a continuous embankment or road-bed. But it is not our province to inquire what might possibly be done. The legislature has not prescribed what kind of bridges railroad companies shall build. It has proceeded upon the theory that such as are built are not always as safe as a continuous embankment or road-bed. It did not undertake to determine where a bridge would be less safe than a continuous embankment or road-bed. It has assumed that there may be such cases, and it is not for us to say that there cannot be. If there may be, the court below may have found in this case that bridges, such as are commonly built, would not, at the places where bridges were taken out, be as safe as a continuous embankment or road-bed. In order to sustain the decision we are justified in assuming that the court so found. The safety of the traveling public then is promoted by what was done. The plaintiffs' land having been taken for such object, was, we think, taken for public use, and that, too, in such sense, as under the statute,

The State v. Porter.

properly authorizes the exercise of the right of eminent domain.

Whether the statute was designed to authorize the exercise of such right, where merely the convenience and economy of the company would be promoted, we need not inquire. For the purposes of this opinion, it might be conceded, that if it was so designed, it would in its application to such a case, be unconstitutional. In its application to the case at bar, where the safety of the traveling public is promoted, we think it is not unconstitutional. In our opinion the plaintiffs' petition was properly dismissed

AFFIRMED.

THE STATE V. PORTER.

1. **Rape: ASSAULT WITH INTENT: EVIDENCE: COMPETENCY OF.** Where the defendant was charged with having unlawfully carnal knowledge of one O., a female, by administering to her a drug producing stupor, and was convicted of an assault with such intent, it was immaterial, under the verdict, whether the prosecutrix knew the bad reputation of the defendant in respect to women prior to the alleged offense, and testimony of such knowledge was properly excluded.
2. —: —: —: **BELIEF OF WITNESS.** In such case, the fact that a witness may have believed the prosecutrix unchaste would not be competent testimony. The prosecutrix could not be proven unchaste by proving that the witness believed her to be so.
3. —: —: **CORROBORATIVE TESTIMONY.** If it be necessary that the prosecutrix should be corroborated, to sustain a conviction for administering a drug with intent, etc., of which there is doubt, and the question is not determined, such corroborative testimony exists in this case.
4. —: **DEGREES OF CRIME: INSTRUCTION: VERDICT.** Under the evidence in this case the jury should have been allowed, if they saw fit, to find the defendant guilty of an assault and battery or a simple assault; and an instruction that they must find the defendant guilty as charged, or guilty of an assault with intent, etc., or not guilty, was erroneous.

Appeal from Woodbury District Court.

THURSDAY, MARCH 23.

THE defendant was charged with having unlawfully had car-

The State v. Porter.

nal knowledge of one Rosa Lina Ottoway, a female, by administering to her some substance producing such stupor and imbecility of mind and weakness of body as to prevent effectual resistance.

The jury found a verdict in these words: "We, the jury, do not find the defendant guilty as charged, but we do find him guilty of an assault with intent to have carnal knowledge of Rosa Lina Ottoway, by administering to her some substance with intent to produce such stupor or imbecility of mind, or weakness of body, as to prevent effectual resistance." Judgment of imprisonment for five years having been rendered upon the verdict, the defendant appeals.

Argo & Kelley, Isaac Pendleton, and J. F. Duncombe,
for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—The defendant is a physician, and was at the time of the alleged offense engaged in the practice of his profession at Le Mars. The prosecuting witness was engaged in teaching school a few miles from Le Mars. According to her testimony she had made the acquaintance of the defendant, and had for several months been accustomed to take long rides with him; that on one occasion after he had been riding with her he took her to his office in Le Mars, where she stayed all night, and occupied the same bed with him in a bed-room adjoining the office, and had sexual intercourse with him. It was upon that occasion that the alleged offense was committed, if at all. She testified that the defendant accomplished his purpose by administering a drug in wine to her, but her testimony in regard to the effect of the drug, if one was administered, does not tend strongly to show that it produced such stupor, or imbecility of mind, or weakness of body, as to prevent effectual resistance, and according to the finding of the jury, the defendant did not accomplish his purpose by reason

The State v. Porter.

of the effect of a drug. The inference from her testimony in connection with the verdict is that he accomplished his purpose by gaining her consent.

I. A witness was examined in behalf of the defendant, who testified that he heard a conversation prior to the alleged offense between the prosecutrix and another woman concerning Dr. Porter, and the prosecutrix stated that she knew all about Dr. Porter. The witness was then asked what, if anything, was said about Dr. Porter being a fast man in respect to women. The question was objected to by the State as being immaterial, and the objection was sustained. The defendant assigns error upon the ruling. He insists that if the prosecutrix knew before the alleged offense, that he had a bad reputation in respect to women, it would tend to show that she consented to the intercourse, and that the offense committed was merely fornication. But we have already seen that, according to the verdict, the defendant did not accomplish his purpose by reason of the effect of a drug. The offense of which the jury found the defendant guilty was committed, if at all, before the intercourse, and consisted merely in administering the drug with intent to have intercourse by means of its effect. The fact that the prosecutrix knew the bad reputation of the defendant in respect to women would, we think, have had no tendency to show that he did not administer a drug, and with the intent found.

II. One Armfield was examined in behalf of the State. In cross-examination he was asked a question which, if it had been answered in the affirmative, the defendant claims, would have shown either that the witness believed that the prosecutrix was unchaste, or that he had become very fond of her, and therefore gave his testimony under a bias against the defendant.

The prosecutrix could not be proven unchaste by proving that the witness believed that she was unchaste, nor do we think that the fact that the witness had become fond of her, if such

The State v. Porter.

was the fact, would have the effect to impair the general credibility of his testimony as claimed.

III. The defendant contends that he could not properly be convicted of the crime with which he was charged upon the testimony alone of the prosecutrix, and he insists that she was wholly uncorroborated.

Section 4560 of the Code provides that for certain offenses among which is rape, the defendant cannot be convicted upon the testimony of the person injured, unless she is corroborated by other evidence, tending to connect the defendant with the commission of the offense. Now, it is said that, while in this case it may be that the defendant is not charged with rape, he is charged with an offense so nearly allied to it, that the provision of the statute in respect to corroboration ought to apply.

It should be borne in mind, however, that the defendant was not convicted of the crime with which he was charged, but of administering a drug with intent, etc. It is, to say the least, doubtful, whether in case of conviction for such offense, it is necessary that the prosecutrix should be corroborated. But we do not determine the question. We think, that the prosecutrix in this case, was corroborated. There is evidence, aside from her testimony, tending strongly to show that the defendant took her to his office at the time of the alleged offense, with the deliberate purpose of accomplishing her ruin, and that he gained his purpose; and while, under the verdict, the jury does not appear to have believed that he gained it by means of an administered drug, the evidence of his purpose tended to make credible the prosecutrix' testimony that he attempted to gain it in the manner alleged.

IV. The court, in its instructions, confined the jury to three forms of verdict. They were told in substance, that they must either find the defendant guilty as charged, or guilty of an assault, with intent to have carnal knowledge of the prosecutrix, by ad-

4. —: —: —: —:
degrees of
crime:
instruction:
verdict.

The State v. Porter.

ministering a drug, with intent to produce stupor, etc., or else they must find the defendant not guilty.

The defendant contends that under the rulings in *State v. Walters*, 45 Iowa, 389; *State v. Vinsant*, 49 Iowa, 241, and *State v. Peters*, 56 Iowa, 263, the jury should have been allowed, if they saw fit, to find him guilty of an assault and battery, or a simple assault. The counsel for the State insists that these cases are not applicable; but we are unable to conclude that they are not. The offense charged could not have been committed without an assault. We do not say that administering a drug, if done without force and without deleterious effect, though with wrongful intent, is an assault. But, the offense charged, is completed only by having carnal knowledge, which act would include an assault if so done as to constitute the offense charged. The counsel for the State insists, that the jury could not properly have found under the evidence that the defendant was guilty of an assault and battery, or simple assault, but in our opinion they could.

There was evidence tending to show, that the prosecutrix had stated before the trial, that the defendant did not administer drugged wine to her. There was also evidence tending to show that she proceeded voluntarily and in full possession of her senses to occupy the defendant's bed with him. And while she testified that the defendant seized her, and administered drugged wine to her by force and against her protests, the evidence tended strongly to show that she made no outcry, and that she could, by so doing, easily have rescued herself if she had seen fit. There is at least some ground for believing that drugged wine was not in fact administered to her, and at the same time that her testimony in respect to it was not wholly fabricated. It is impossible to determine with certainty what the facts were. If the jury had believed that the defendant seized the prosecutrix against her will with the intent to administer drugged wine to her, either by persuasion or force, or both combined, and relinquished his intention by

 Wharton v. Wharton.

reason of her protests or threats of outcry, or because he saw indications of her yielding to his will, it could not be said that such conclusion would be unsupported by the evidence. If such was the fact, then the defendant was guilty only of an assault and battery, so far as such fact alone was concerned. If he did not proceed that far, but merely approached the prosecutrix with drugged wine against her will, and with more or less offer of force, he was guilty of a simple assault. In restricting the jury to the three forms of verdict above set out, we think that the court erred, and that the case must be remanded for another trial

REVERSED.

 WHARTON V. WHARTON.

- 57 696
83 474
1. **Divorce and Alimony: INJUNCTION: ATTACHMENT.** In an action for divorce and alimony the plaintiff, upon a proper showing, is entitled to an injunction restraining the defendant from disposing of his property to defeat the claim for alimony. The remedy by attachment given by statute, section 2227, Code, is cumulative only, and not exclusive.

Appeal from Jasper District Court.

THURSDAY, MARCH 23.

THE plaintiff commenced an action against the defendant for divorce and for alimony. Afterwards she filed her petition for an injunction, restraining the defendant from disposing of his real estate and personal property, until the final disposition of the action for divorce and alimony. The petition described the property, the sale of which was sought to be enjoined. A temporary injunction was granted. Afterwards a motion was made to dissolve the injunction. Upon the hearing of the motion all of the property was released from the operation and restraint of the writ, excepting the land, the

 Wharton v. Wharton.

horses, farming implements, and milch cows, and the motion to dissolve was overruled. From this ruling the defendant appeals.

Norris & Dunn and *H. S. Winslow*, for appellant.

Patterson & Harrah, for appellee.

ROTHROCK, J.—The question presented by counsel is whether the plaintiff in an action for divorce and alimony is entitled,

upon a proper showing, to an injunction restraining the disposition of property by the defendant.

It is conceded that such a proceeding may properly be had under section 3386 and 3388 of the Code, unless the remedy by attachment, provided in proceedings for divorce, by section 2227, is exclusive. It is contended that it is an exclusive remedy, and not merely cumulative. We think it is quite clear that it is cumulative only, and that notwithstanding an attachment is now allowed, the remedy by injunction may still be pursued.

Section 2227 contains nothing which in the least impairs the right to the equitable remedy by injunction. It provides an additional remedy which the party may pursue at his option if he deem it expedient. The mere fact that another remedy is provided, which in some instances may be more effective, does not destroy the remedy already existing.

AFFIRMED.

Bolster v. Post.

BOLSTER V. POST. ●

1. **Bond: BREACH OF: DAMAGES: TENDER.** Where a bond was conditioned for the delivery of a certain land warrant on or before a certain date, if the obligor violated the conditions of the bond and became liable thereon for damages, he could not, after such liability attached, defeat it by a tender or delivery of the warrant into court.
2. —: —: **CONSTRUCTION OF: PENALTY.** Under the conditions of a certain bond, set out in the opinion, for the delivery of a certain land warrant, it was held that the amount which the defendant obligated himself to pay must be regarded as a penalty, and not as liquidated damages, and that plaintiff was not entitled to recover more than the value of the warrant.

Appeal from Appanoose Circuit Court.

THURSDAY, MARCH 23.

ACTION upon a bond conditioned for the payment of money and the delivery of a land warrant. There was a verdict for plaintiff. Defendant appeals.

George D. Porter, for appellant.

No appearance for appellee.

BECK, J.—I. The action is brought on an instrument in writing of the following form:

“Know all men by these presents, that we, August Post and E. R. Atkinson, as principals, and J. T. Atkinson and W. A. Davis, as sureties, all of Washington township, Appanoose county, State of Iowa, are held and firmly bound unto C. W. Bolster, Washington township, county and State aforesaid, in the sum of eight hundred dollars, lawful money of the United States, to be paid to the said C. W. Bolster, his executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

“Dated at Moulton Iowa, this May 23d, 1877.”

Bolster v. Post.

"The condition of the above obligation is such that if the above bounden August Post and E. R. Atkinson, their heirs, executors or administrators, shall well and truly pay or deliver, or cause to be paid and delivered unto the above-named C. W. Bolster, his executors, administrators or assigns, the just and full sum of eight hundred and seventeen and $\frac{1}{100}$ dollars to be paid as follows: Two hundred and seventeen and $\frac{25}{100}$, or a receipt for the same, in satisfaction of a debt secured by chattel mortgage for the said amount of two hundred and seventeen and $\frac{25}{100}$ dollars, including interest and costs, on or before the 29th day of May, 1877. Also a land warrant for six hundred and forty acres of land. Said land warrant, or land warrants, is for land situated in the State of Texas, on or before the 2d day of June, 1877. The above amount being for the purchase-price of all the type, furniture, presses, imposing stone, and all the printing material of every description, belonging to the office of the *Moulton Reporter*, a newspaper at Moulton, Iowa, then the above obligation to be void, otherwise to remain in full force and virtue in law.

Signed, AUGUST POST,
 E. R. ATKINSON,
 J. T. ATKINSON,
 W. A. DAVIS."

The petition alleges that the bond was executed to secure the purchase-money of the printing office named in the instrument which, under the agreement of the parties, was \$817.25, and that the conditions of the obligation had been broken by the failure of the defendant to deliver the land warrant.

The answer alleges that, by a subsequent contract between the parties, it was agreed that the land warrant was to be held by defendant until the payment of certain rent due from plaintiff, which was a lien on the printing office, and that defendant has had no notice of the payment of the lien, and no demand had been made upon him for the warrant. The answer also alleges that he is ready and willing to deliver the land warrant

to plaintiff, and has deposited it with the clerk of the court to be so delivered.

It appears that the land warrant in question was a certificate, or scrip, entitling the holder to 640 acres of land in the State of Texas.

II. The instructions given by the court to the jury were applicable to the testimony introduced by the respective parties.

The defendant asked the court to direct the jury that if they find the warrant, or scrip in question, had been deposited with the clerk they should find for defendant.

1. BOND :
b each of :
damages :
tender.

The refusal to give instructions containing such directions is complained of by defendant. We think they were properly refused.

If defendant violated the condition of the bond by failure to deliver the warrant, as required by the terms of the contract, he became liable upon the instrument for damages. He could not, after such liability attached, defeat it by a tender or delivery of the land warrant into court. He could not in that way escape from a judgment for the damage prescribed by the law. His breach of the contract, at the option of the plaintiff, changed the claim against him into a money demand.

III. The court instructed the jury that if they found for plaintiff, he was entitled to recover \$582.75, that is, \$800, the penalty of the bond, less \$217.25, the amount paid upon the chattel mortgage mentioned in the instrument. The instruction, we think, is erroneous. The bond obligated defendant to deliver the land warrant. No value upon the warrant is fixed in the bond or by the contract of the parties. The purchase price of the printing office is shown to have been \$817.25. This was to be paid, \$217.25 in cash, and the balance in the scrip or warrant. The scrip was thus taken at \$600. But the defendant entered into no obligation to pay scrip of that value, nor did he warrant that it was, and that it would continue to be, of that value. It is very

2. ———: con-
struction of :
penalty.

Lawrence v. Smith.

plain that the parties did not consider the scrip to be of that value, \$600, for the penalty of the bond, beyond which they could recover nothing, does not equal the price of the printing office, but is \$17.50 less. The parties fixed no value upon the scrip for which, under the contract, defendant should become liable in case of his failure to deliver it. It thus appears that the terms of the instrument clearly disclose the fact to be that the \$800 which defendant obligated himself to pay, is to be regarded as a penalty, not as liquidated damages. Plaintiff, therefore, was not entitled to recover more than the value of the scrip.

Other questions are discussed by defendant's counsel, but as they are not wholly free from doubt, and we have no light from argument on plaintiff's side of the case, we do not pass upon them.

For the error in the instruction above pointed out the judgment of the Circuit Court must be

REVERSED.

LAWRENCE V. SMITH.

1. **Railroads: SUBSCRIPTION NOTE: EVIDENCE.** In an action upon a subscription in the form of a note, to aid in the construction of a railroad, it was competent for the defendant to show by the subscription papers and by the declarations of the agent who procured the note, that the railroad was to be built between certain points. The leasing of a part of the road between two points is not a compliance with the contract to construct a road between said points.

Appeal from Poweshiek District Court.

FRIDAY, MARCH 24.

THE plaintiff brings this action upon a promissory note executed to the Grinnell & Montezuma Railroad Company, or bearer. The petition and amended petition allege that the railroad was completed as stipulated in the note, and that cer-

Lawrence v. Smith.

tificates of stock have been issued and tendered to the defendant. The answer to the petition and amended petition admits the execution of the note and the tender of the stock as alleged. The answer alleges that the Grinnell & Montezuma Railroad referred to in said note, and in the articles of incorporation of said company, was a railroad commencing at Grinnell, Iowa, and ending at Montezuma, Iowa; that such railroad has not been completed, no railroad having been constructed within three miles of Grinnell. The cause was submitted to a jury, and a verdict was returned and a judgment rendered in favor of plaintiff for \$208. The defendant appeals. The cause was before the court on a former appeal. See 50 Iowa, 703.

Clark & Cheshire, for appellant.

No argument for appellee.

DAY, J.—The instrument upon which the plaintiff sues is as follows:

“For value received, I promise to pay to the Grinnell & Montezuma Railroad Company, or bearer, the sum of two hundred dollars, upon the completion of said railroad and cars running thereon to the depot at Montezuma, Iowa, if done within one year from the first day of January, 1875, with interest at the rate of ten per cent per annum from maturity.

“This note to be due and payable when the cars run to the depot above named, within the time above stipulated, and on such payment the G. & M. R. R. Company agree to issue to the maker of this note a certificate of stock for each one hundred dollars mentioned in this note; but if said road be not completed, within the time above named, this note to be void, and on demand returned to the maker. Said road to be standard guage.”

The articles of incorporation of the railroad company in question, which were introduced in evidence, declare the ob-

1. RAILROADS:
subscription
note: evi-
dence.

Lawrence v. Smith.

jects of the incorporation to be "to build the Grinnell & Montezuma Railroad and construct a telegraph line." The jury returned a special finding that the Grinnell & Montezuma Railroad has been constructed between Montezuma and a point three and one-half miles south of Grinnell on the Central Railroad of Iowa. The defendant introduced subscription papers to the capital stock of the railroad in question, showing that the various subscribers agreed to pay the several sums set opposite their names "to the stock of the Grinnell & Montezuma R. R. Company to aid in the construction of a railroad from Grinnell to Montezuma." The defendant also testified that when he gave his note it was represented to him, by the person to whom he gave it, that the Grinnell & Montezuma Railroad was to be built from Grinnell to Montezuma. Upon the submission of the cause the court withdrew all this testimony from the jury, and instructed the jury as follows:

"Under the articles of incorporation and the note or contract sued on, the plaintiff is entitled to recover, if he has shown that the Grinnell & Montezuma Railroad Company constructed its road on the line between Grinnell and Montezuma, from Montezuma, a distance of thirteen miles, to intersect with the Central Iowa Railroad at a point three and one-half miles south of Grinnell, and that the cars were running on such road by it built and over said Central Iowa Railroad, under a lease, between said point of intersection and Grinnell, to the depot at Montezuma, before January 1st, 1876, and that prior to that time and continuously since, said railroad, and by such means, has established and maintained railroad communication between said two points, it being conceded that defendant has been tendered the stock called for in the contract."

In this action the court erred. It was competent to show by the subscription papers, taken by the defendant to its stock, that the Grinnell & Montezuma Railroad was a railroad to be built from Grinnell to Montezuma. It was also competent to show the declaration of the agent of the defendant, who pro-

Hickenbottom v. The C., B. & Q. R. Co.

cured the note, that the railroad was to be built from Grinnell to Montezuma. This declaration was simply in harmony with the written subscriptions, and showed the inducement which was held out to the defendant for the execution of his note. The evidence does not vary or contradict the note, but simply shows that the defendant executed it with the understanding that the road would be built as specified in the stock subscription. That the leasing and operation of a part of a road between two points is not a compliance with an agreement to construct a road between said points. See *Lamb v. Anderson*, 54 Iowa 190.

REVERSED.

HICKENBOTTOM V. THE C., B. & Q. R. CO.

1. **EVIDENCE: SUFFICIENCY OF: NEW TRIAL.** Where the evidence fully sustains the verdict, the judgment of the court below must be affirmed; and newly discovered evidence, which is merely cumulative, will not entitle the party to a new trial.

Appeal from Jefferson District Court.

FRIDAY, MARCH 24.

ACTION to recover double the value of a cow which, it is alleged, was killed on the track of defendant's road by an engine and train, by reason of the want of a sufficient fence upon the line of the railroad. There was a trial by jury and a verdict and judgment for plaintiff. Defendant appeals.

Slagle & McCrackin, for appellant.

Ratcliff & McCoy, for appellee.

ROTHROCK, J.—The principal ground upon which a reversal of the judgment is claimed, is that the verdict finds no support in the evidence. This point is urged in a printed argument which elaborately reviews the

1. **EVIDENCE:**
sufficiency of:
new trial.

MALLI v. WILLETT.

evidence, and counsel in an oral argument strenuously contended that under the evidence there was no justification for the verdict, and that notwithstanding the well known rule prevailing here, a new trial should be granted.

We have each carefully examined the whole record. The evidence appears to be fully presented and our conclusion is that the judgment must be affirmed. It is not to be expected that we will set out and discuss the evidence. The announcement of our conclusion on a question of fact is sufficient. The evidence is of no consequence to the profession and our views upon it would probably leave counsel for the appellant with minds unchanged, firmly believing that the verdict is a great wrong upon their client.

II. The motion for a new trial was grounded, in part, upon certain alleged newly discovered evidence. This evidence was merely cumulative, and therefore was not such as entitled the defendant to a new trial.

AFFIRMED.

MALLI v. WILLETT.

1. **Contract: CONSTRUCTION OF: BREACH OF.** A contract, set out in full, construed and held not to convey a vested interest in the premises therein described; and that the foreclosure of the mortgage therein referred to, could not be an adjudication of the rights of the grantee under the contract, nor preclude her from bringing an action for a breach of the contract.
2. —: **CONSIDERATION: COMPROMISE OF FELONY.** A contract will not be declared void and the cause be reversed, on the ground that the only consideration therefor was the compromise of a felony, where it does not clearly appear from the evidence whether the consideration for the contract was a forbearance to prosecute criminally, or in a civil action for damages.
3. —: **PARTIES TO ACTION.** Under the terms of the contract, the action for a breach thereof was properly brought in the name of plaintiff alone, without joining her husband.

Malli v. Willett.

4. ———: FOR LIFE ESTATE: BREACH OF: MEASURE OF DAMAGES. For the breach of a contract to convey a life estate in certain premises, the plaintiff is entitled to recover the present worth of such life estate, reckoned on a basis of six per cent, and no more. To multiply the annual rental value of the premises by the expectancy of life, was an improper method of computation.

Appeal from Winneshiek Circuit Court.

FRIDAY, MARCH 24.

THIS is an application for the allowance of a claim against the estate of Franz Mally, deceased. The claim is based upon an alleged contract in writing, by which the decedent bound himself to give the plaintiff a lease for life, or a life estate, in certain land, and a lease for ten years upon certain other land. Upon a trial in the Circuit Court the claim was allowed to the extent of \$2,000, and the administrator appeals.

Willett & Willett, for appellant.

Brown & Wellington, for appellee.

ROTHROCK, J.—I. The contract upon which the claim is based is as follows: "This agreement entered into this 22d day of October, 1870, by and between Franz Mally, of Clayton county, State of Iowa, of the first part, and John Malli, of Winneshiek county, and State of Iowa, of the second part. Witnesseth: That, whereas, the said Franz Mally, for a valuable, good and sufficient consideration received (the receipt whereof is hereby acknowledge), do hereby promise and agree with said John Malli, that I will grant a life lease to Christina Malli, the wife of John Malli, on the following described land, to-wit: The south half of the northeast quarter, section 14, township 97, range 9, embracing the house which stands in part on the north half of said quarter section, to use said house with the south half of the land as her own, during her and her husband's natural life, but after the death of Chriatina Malli and John Malli all right of ownership to said land shall go back to the

Malli v. Willett.

children of Franz Malli. I do further agree to give a time lease for ten (10) years on the north half of the northeast quarter of section fourteen (14), township 97, range 9, all in Winneshiek county, Iowa.

“Provided, however, that said Christina Malli and her husband shall deliver in the granary at the farm, after the expenses of necessary repairs on buildings and fences have been deducted from the amount so raised from said last named land, for each year during the ten years, one-third of the balance so left, and Franz Malli is to pay all taxes assessed against said farm, except on personal property, which Christina Malli shall pay.

“It is further agreed, that should Christina Malli at any time be willing to give up this contract, I will give her a good warranty deed on eighty (80) acres of land, near Le Mars, in Plymouth county, Iowa, where there is at least four hundred dollars worth of improvements made on it, and all the live stock and farming tools.

“This contract shall take effect from the day the above named land is sold under a foreclosure of mortgage, wherein A. Bradish claims a judgment against John Malli, and for the purpose not to make any more costs to secure the right of redemption for John Malli, I, Franz Malli, will buy the land in at sheriff's sale, and John Malli waiving all rights and interest in the farm. And this new contract under this lease be from that date in full force and virtue, except in case that Christina Malli will except the above agreement left to her option.”

(Signed)

FRANZ MALLY,
JOHN MALLI.”

It appears from certain agreed facts in the case that at the time the written contract was executed, John Malli, the husband of Christina Malli, the plaintiff herein, was the owner and in possession of the premises described in the contract, and that he had executed to Franz Malli a mortgage thereon

Malli v. Willett.

to secure \$5,000 purchase-money for the land. This mortgage was signed by John and Christina Malli, and it is the same mortgage which is mentioned in the written contract. Franz Mally had commenced an action to foreclose this mortgage against John and Christina Malli and A. Bradish et al., and afterwards the same action was dismissed. In 1871 Franz Mally assigned said mortgage without consideration, and after maturity, to his four sons, Frederick, William, Paul and John Mally. The assignment provided that the assignees should secure to Christina Malli a lease for ten years on S $\frac{1}{2}$. NE $\frac{1}{4}$, section 14, T. 97, R. 9, on the terms that Christina Malli should pay to the assignees one-third of the crops raised on said land during the lease. The assignment made no provision for the life estate, or lease for life, upon the other eighty acres of land. The assignees afterward commenced an action to foreclose the mortgage. John and Christina Malli appeared in the action and alleged fraud in the execution of the mortgage and payment and satisfaction of the mortgage debt. The court adjudged that the plaintiffs in the action were entitled to judgment and a decree of foreclosure, whereupon the defendants asked until the next day to file an amendment, setting up the written contract with Franz Mally. This was refused. The decree of foreclosure was entered and afterwards the land was sold on special execution, the assignees of the mortgage purchasing the same by a trustee, who afterwards conveyed to them. An action was commenced by the assignees for possession of the land under a claim of absolute ownership. John and Christina Malli appeared to this action and pleaded the contract and assignment hereinbefore referred to, and claimed to be entitled to the possession of the premises. The plaintiffs to the action pleaded the decree of foreclosure as an adjudication, and the court rendered a judgment in favor of the plaintiffs. From this judgment John and Christina Malli appealed to this court, where the judgment was affirmed. See 52 Iowa, 654.

Malli v. Willett.

In making the allowance of \$2,000 to the plaintiff herein the court allowed nothing for the eighty acres on which it was agreed to give the ten years lease and which appears to have been provided for in the assignment made by the decedent to his sons. The allowance was made only on the eighty acres on which the life lease was to be given.

It is insisted by counsel for the defendant that the contract conveyed to Christina Malli a vested interest in the premises, and that because she failed to assert her interest in the suit for foreclosure, her right to the land has been adjudicated and lost to her. This we think is a mistaken view of the contract. It was not a lease, but an agreement upon the part of Franz Mally, that he would become the purchaser of the land at the sheriff's sale and thus secure to plaintiff a life estate in the land. Until he became such purchaser he had no interest in the land other than that of mortgagee. Instead of becoming the purchaser he dismissed the suit for foreclosure and assigned the mortgage to his sons without, in any manner, reserving or saving the rights of Christina Malli to the life estate. It is true, perhaps, that no right of action accrued to her upon the assignment of the mortgage, because there had been no breach of the contract until the failure of Franz Mally to become the purchaser at the sale. She had no right to set up her agreement for a life lease against the assignees of the mortgage, for the very good reason that her contract was still subsisting, and it was within the power of Franz Mally to perform it by becoming the purchaser at the sale on foreclosure of the mortgage. It is very clear to us that the foreclosure of the mortgage could not be an adjudication of her rights under the contract.

II. It is next contended that the plaintiff repudiated her rights under the contract by setting up the defenses of fraud, and payment, and satisfaction of the mortgage. This position does not appear to us to be tenable. Franz Mally had dismissed the foreclosure proceeding under which it was contempla-

1. CONTRACT:
construction
of : breach
of.

Malli v. Willett.

ted he was to become the purchaser. He had assigned the mortgage to his sons. Now, while it was still within his power to perform his contract by a purchase of the land, he was in no way prejudiced, misled, or injured by the defense set up to the foreclosure. If such defense had been successful, of course the contract could not have been performed. But having failed to establish the defense, we can see no reason why she cannot resort to her action for a breach of the contract, when the breach occurred, which was at the time Franz Mally put it out of his power to perform, by failing to become the purchaser at the foreclosure sale.

III. It is next claimed that the agreement is void because its only consideration was a compromise of a felony. The only

2. _____ : con-
sideration :
compromise
of felony.
evidence upon this question was that of a witness who testified as follows: "Ques. Do you know what was the consideration of this contract? Ans. Yes. Ques. State it? Ans. There was a difficulty among the family. John Malli wanted to get his brother prosecuted for some offense. Ques. State what the offense was? Ans. For adultery with John's wife; and this contract was executed so as not to have any fuss with him about it—to settle up that matter."

If we were to concede that John or Christina Malli could, under the law, have prosecuted Franz Mally criminally, for adultery with Christina, and that a contract made in consideration of their forbearance to prosecute would be void, yet we would not reverse a cause without clearer evidence that it was the criminal charge which was compromised, than that given above. Whether John Malli desired to prosecute his brother, criminally, for the offense, or merely to prosecute him in a civil action for damages, does not clearly appear from the evidence. In common parlance the word prosecution is frequently applied to civil actions for torts.

IV. It is further claimed that this action should have been

Mall v. Willett.

brought in the name of John Malli, or in his name and that of
 3. ———: the plaintiff jointly. The ready answer to this is
 parties to ac-
 tion. tion. that Franz Mally contracted to make the lease to
 the plaintiff, and not to her and her husband jointly. It is also
 claimed that there is neither allegation nor proof that plaintiff
 did not elect to take the Plymouth county land in satisfac-
 tion of the contract. The fact that she claims damages for
 failure to make the lease, and the further fact that there is no
 showing in the record that she gave up the contract and took
 the Plymouth county land, are sufficient to meet this objec-
 tion.

V. It is said that the amount of the allowance is excessive.
 The only evidence as to the value of the life interest in the
 4. ———: for eighty acres is that the annual rental value thereof
 life estate:
 breach of:
 damages. is \$1.50 per acre, and that plaintiff's expectancy
 of life is sixteen and two-third years. The court
 evidently found the value of the life interest by multiplying
 the annual rental value by the expectancy of life. This is
 plainly an improper method of adjusting the rights of the par-
 ties. Two thousand dollars approximates the full value of an
 ordinary eighty acre tract of land. The plaintiff is entitled to
 the present worth of a life estate, and no more. This, upon the
 basis of interest at six per cent, would be \$1,223.46. If the
 plaintiff will remit the excess of that amount within thirty
 days from filing this opinion, the judgment will be affirmed.
 If no such remission be made the cause will be

REVERSED.

WEBB ET AL. V. HOLT ET AL.

1. **Pension: EXEMPTION: WHEN LIABLE TO ATTACHMENT.** Where a pensioner received the pension due him under the acts of Congress, on account of physical disability received while serving as a soldier in the late war, in the form of a draft, drew the money on the draft and deposited the same in a bank to his credit, it was not exempt, in the hands of the bank, from the process of attachment for the pensioner's debts. ROTHROCK and BECK, JJ., *dissenting*.

Appeal from Scott Circuit Court.

FRIDAY, MARCH 24.

THE plaintiffs commenced suit by attachment against the defendant, D. A. Holt, and garnished the German Savings Bank of Davenport. Subsequently the plaintiffs recovered judgment against the defendant in the main action. The cause was tried, as to the garnishee, by the court, and judgment was rendered against the garnishee for \$300. The defendant and the garnishee appeal.

The facts are stated in the opinion.

Martin, Murphy & Lynch, for appellants.

Bills & Block, for appellees.

DAY, J.—The court found the facts in the case as follows:

- "1. That on the 15th day of March, 1880, the defendant, D. A. Holt, received from the government of the United States the sum of \$2,029.82, in form of a draft from a pension agent of the government, as a back pension due him under the acts of Congress, on account of physical disabilities received while serving as a soldier in the late war. He drew the money on said draft, and used a part, and deposited the balance as stated in the next finding.

"2. That of said pension, on the 29th day of March, 1880, said Holt deposited the sum of \$700 in the German Savings

Webb v. Holt.

Bank of Davenport, Iowa; that said money was placed in said bank that the same might draw interest and be taken from the said bank from time to time, for the support of the defendant and his family; that the said Holt at the time of the deposit, before and since, resided in Moline, in the State of Illinois, while plaintiffs resided in Davenport, Iowa; that on the 28th day of October, 1880, and before the garnishment, he drew as interest on said deposit, \$17.50.

"3. That after the service of the garnishment, by consent of plaintiff, the defendant was permitted to draw from the bank the sum of \$300, of said \$700, but this was done simply because \$400 would be sufficient to satisfy plaintiffs' demand if found liable therefor.

"The court found, as a conclusion of law, that the money was not, in the hands of the bank, exempt under section 4747 of Title 57, of the Revised Statutes of the United States, from the process of attachment, for the reason that said act only applies to pension money while in course of transmission, and did not apply after a pension was received and placed, as this was, on deposit in a bank."

The defendants claim that the money in question is exempt from attachment under section 4747 of the Revised Statutes of the United States, which is as follows: "No sum of money due, or to become due, to any pensioner, shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer, or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The appellants cite and rely upon *Eckert v. McKee*, 9 Bush. (Ky.), 355; *Hayward v. Clark*, 50 Vermont, 612, and *Folschow v. Werner*, in the Wisconsin Supreme Court, 51 Wis., 85. In *Haywood v. Clark*, the defendant received a check or draft from the United States pension agent, and gave it to his wife, who, by his advice, passed it to

Webb v. Holt.

one Pierpont, and took his note therefor. A creditor sought to charge Pierpont as a trustee of the defendant. The court held that while the check or draft from the pension office was the form of the defendant's claim, and while that constituted the matter of *credit* in the sense of the trustee law of the State, it, or the value represented by it, could not be reached by any creditor by any process or proceeding; that the defendant had the right to give the draft to his wife, and the legal title passed to her by gift; that the only ground upon which Pierpont could be charged as for a debt due from him, on the score of the draft, was the note given to the wife, and that, upon the facts shown the note did not render him liable as on a note payable and delivered to the husband. It is evident that this holding determined the case, and, perhaps, correctly, for it may well be decided that, until the original draft, through which the money is transmitted is cashed, the money, in the language of the statute, "is in course of transmission to the pensioner," and that he might then, without any fraud upon his creditors, give it to his wife. The court, however, went further, and declared what it would feel it to be its duty to hold, in order to protect the pension from process, did the case require it. What is further said in the opinion, it appears to us, can be regarded only as *dictum*.

In the case of *Eckert v. McKee*, Adams, the pension agent, at Lexington, drew his check on the United States Assistant Treasurer, for a pension due to Mrs. M. H. McKee. The check was payable to the order of Mrs. McKee. On the same day, one J. T. Vanorsdale brought the check with the name of Mrs. McKee indorsed thereon, to the office of the pension agent, who went with Vanorsdale to a bank, and introduced him, when the money was paid to him. The creditors of Mrs. McKee sought to subject a part of the money to the payment of their debts. It does not appear from the statement of facts, whether the money had ever, in fact, come into the possession of Mrs. McKee, or was still in the hands of Vanorsdale.

The court, without citation of authority or reasoning to support the determination, concluded that the fund was not liable to attachment. If the money had not come into Mrs. McKee's possession, it might be regarded as in course of transmission, and hence as coming under the protection of the statute. The case of *Folschow v. Werner* is the only one, in which it distinctly appears from the facts, that the question of exemption, after payment to the pensioner, was involved. In that case it was held that the pension money was exempt from liability for the pensioner's debts. In the opinion the case of *Eckert v. McKee*, is cited and relied upon. The reasoning of the court is not, to our minds, satisfactory. Upon the other hand, the appellee cites and relied upon *Kellogg v. Waite*, 12 Allen, 529, and *Spelman v. Aldrich*, 126 Mass., 113. In *Kellogg v. Waite* the money had been paid to the agent of the pensioner before the statute in question was enacted, and the court held that it could not be controlled by it. In *Spelman v. Aldrich* the court, without any reasoning, and relying solely upon *Kellogg v. Waite*, held that even if, under the statute in question, the pension was exempt while it remained in the form of a pension check, the exemption certainly ceased after the money was drawn upon the check. The question resting in so unsatisfactory a situation, upon authority, we feel at liberty to determine it wholly upon principle. The section, by its direct terms, is limited to money in two conditions, money due to a pensioner, and money to become due to a pensioner. The pension is a fixed amount of money payable at stated periods. When the period for payment has elapsed, the money is due; before such period has elapsed, the money is to become due. When the money has actually come into the hands of the pensioner, it ceases to be money due, or to become due, and then, it seems to us, the statute ceases to apply to it. It is said, however, that the statute provides that the money shall inure wholly to the benefit of the pensioner. In our opinion it does inure wholly to the benefit of the pen-

Webb v. Holt.

sioner, when it comes into his possession, and becomes subject to his control, under the laws of the State, in the same manner as other property owned by him. The provision of the statute, "whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto," cannot be ignored in placing a construction upon the statute. This, it seems to us, imposes a limitation upon a provision which would otherwise be general, and determines the peculiar situation in which money due, or to become due, shall be exempt from seizure. The enumeration of particulars implies a negation of the general. If the statute exempts money paid to a pensioner, even after it comes into his hands, the particular enumeration of conditions under which the money would be exempt, becomes unnecessary and unmeaning, and might as well be eliminated from the statute. In our opinion, the purpose of the statute is to render it certain that the government's bounty shall come into the hands of its beneficiary, and shall not be seized for its debts before it reaches him. If it had been the intention to impress upon it a different character, after it comes into the hands of the pensioner, from other property owned by him, it seems to us that that intention would have been expressed in a manner more certain and direct. Indeed, it may well be doubtful, whether the ordinary incidents of property which has vested in a citizen of a State, can be controlled or modified by federal legislation.

In our opinion the statute in question ceased to be applicable to the money when it was paid to the pensioner.

AFFIRMED.

ROTHBROOK, J., *dissenting*.—I cannot concur in the foregoing opinion of the majority of the court. A pension is granted to a soldier because of some physical disability rendering him unable to earn a living by manual labor. It is intended for the support of himself and family. In case of his death, it is

continued for the benefit of his widow and orphan children under sixteen years of age. The statute provides that it shall not be seized for debt before it is received by the pensioner, but shall inure wholly to his benefit. The last provision excludes the idea that it can be seized after it comes into his possession. The provision that it shall inure wholly to his benefit, is intended to mean something. If the opinion of the majority is correct, it is mere surplusage and means nothing, for the money is fully protected until it comes into the hands of the pensioner by the previous provisions of the section. This last provision is used in the same connection as that which prohibits the seizure by creditors before it comes into the possession of the pensioner, and when in the same clause and sentence of the statute it is provided that it shall inure wholly to the benefit of the pensioner, the exclusion of creditors could be made but little plainer if the section had concluded with the words, "and not for the benefit of creditors." It is said, in the majority opinion, that the money does inure wholly to the benefit of the pensioner when it comes into his possession and becomes subject to his control. In the general sense, this is true, but, it appears to me, the opinion ignores the thought that this is a statute of exemption and its very object and purpose is to prevent creditors from seizing pension money.

It is conceded by the majority that the case of *Folschow v Werner*, 51 Wis., 85, is in point. In my judgment the opinion in that case is correct, and shon'd be followed, especially in view of the well established rule that exemption laws are to be liberally construed in favor of the debtor.

In my opinion the judgment should be reversed, and I am authorized to say that Mr. Justice BRON concurs in this dissent.

MUNDHENK v. THE C. I. R. Co.

57	718
86	617
57	718
104	602
57	718
104	69

1. **Railroads: INJURY TO STOCK: DUTY TO CONSTRUCT CATTLE GUARDS.**
The statute, providing that every corporation operating a railway shall make proper cattle guards, where the same enters and leaves any fenced land, is imperative. The company has the right to fence at all places, except where the public convenience excludes that right, as at depot grounds; and under the facts of this case the question, whether the injury was done at a place where it was fit, proper and suitable for the defendant to fence, was properly excluded from the jury.
2. ———: **INSTRUCTION: EVIDENCE.** An instruction, asked by the defendant and based upon evidence not found in the record, was properly refused.
3. ———: **LIABILITY FOR: ADMISSION OF: EVIDENCE.** In an action to recover for injury to stock by a railroad train, evidence that defendant's road-master agreed upon an arbitration is not competent to show the liability of the company. An offer to arbitrate is not an admission of liability, nor would any admission by the road-master, at another time and place, be deemed the admission of the company.
4. ———: **INSTRUCTION.** The giving of an instruction based upon a theory wholly unsupported by the evidence, was misleading, and prejudicial error.
5. ———: **DOUBLE DAMAGES: AFFIDAVIT FOR: AMENDMENT: SERVICE.** The affidavit, served for the purpose of entitling claimant to double damages for stock killed by a railroad train, need not specifically designate the place where the injury was done. The jurat to such affidavit may be amended within such reasonable time as not to cause essential injury to the other party, and the notice of claim and the accompanying affidavit may be served by the plaintiff or any other person.

Appeal from Marshall District Court.

FRIDAY, MARCH 24.

ACTION to recover double damages for injury to two horses done by one of the defendant's trains; also to recover the amount of a veterinary surgeon's bill paid for doctoring one of the horses. There was a trial by jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Boardman & Daly, for appellant.

J. M. Parker, for appellee.

ADAMS, J.—I. The railroad runs north and south. The horses were struck either where the railroad crosses a highway, running east and west, or a few feet north of the highway. The train which struck them was going north. The plaintiff claims that they were struck north of the highway, and where the defendant had a right to fence. The defendant claims that they were struck in the highway. The defendant also claims that if they were struck north of the highway they were struck where it is not fit, proper, or suitable to fence, and therefore where it had no right to fence.

There was some evidence tending to show that they were struck north of the highway, and the question as to whether they were or not is not reviewable by us.

The question as to whether, if they were struck north of the highway, they were struck at a point where it was fit, proper, and suitable for the defendant to fence, the defendant claims was a question of fact, which should have been submitted to the jury. The defendant propounded a special question upon this point, and asked that it be submitted to the jury; but the court refused to submit it. This refusal is assigned as error.

In respect to the character of the place the facts are undisputed. The land north of the highway was fenced, but no cattle guard was constructed where the railroad enters the land after leaving the highway. The defendant's design was that a certain railroad bridge, which commenced fifty-two feet north of the highway and extended forty-eight feet, should serve as a cattle guard. Fences were constructed on each side of the railroad from the bridge to the highway where the fences connected with the highway fence. These fences in connection with the bridge formed a pocket. The embankment of the

Mundhenk v. The C. I. R. Co.

railroad at the bridge was ten feet high with precipitous sides. The company omitted to put in a cattle guard at the highway because its officers thought that a cattle guard at the highway, so near the bridge, approached as it was upon such an embankment, would imperil the safety of trains. They claim that such would have been the effect, and hence that they were not required to put in a cattle guard at the highway, and could not properly have done so, and could not properly have fenced that part of their road between the highway and the bridge.

Whether the safety of trains would not have been promoted rather than impaired by a cattle guard at the highway is a question which to our mind admits of great doubt. Possibly the jury might have found for the company upon this point. But the refusal of the court to direct the jury to make a finding upon it was not in our opinion error. The statute is imperative. It provides that every "corporation constructing or operating a railway shall make proper cattle guards where the same enters or leaves any improved or fenced land." If an exception ought to be engrafted upon the statute it is the province of the legislature, and not the court, to do it.

The defendant contends, however, that the court has already made a ruling which would justify us in holding that the defendant was not bound to put in a cattle guard if it was not fit, proper, and suitable to do it. The case relied upon is *Davis v. B. & M. R. Railroad Co.*, 26 Iowa, 550. In that case it was held, in substance, that a railroad company has not a right to fence, within the meaning of the statute, except where it is fit, proper, and suitable to fence, and hence that it has not a right to fence depot grounds. But the question there decided is not analogous to the one before us. There is no statute requiring a railroad company to fence anywhere. It has, in the nature of the case, a right to fence except where the public convenience must be held to exclude the right, and in the case cited it was thought that the public convenience must be held to exclude the right to fence depot grounds.

Mundhenk v. The C. I. R. Co.

II. The defendant assigns error upon the refusal to give an instruction which is in these words: "4. If the plaintiff's
 2. — : — : stock was injured in the so-called pocket or curve
 instruction : of the fence towards the bridge, yet, if the point
 evidence. where they were first struck was within the limits of a traveled
 highway of ordinary width—a *de facto* highway—then the
 defendant would not be liable."

It was contended by the defendant that the evidence showed that the public travel had deviated a little to the north, and had spread over ground not enclosed in the legally established highway.

To this we have to say that we find no such evidence.

III. The plaintiff was allowed to show, against the defendant's objection, the acts and declarations of one John Sherman,
 3. — : — : the defendant's road-master. It was made to ap-
 liability for : pear that he agreed with the plaintiff upon an ar-
 admission of : bitration, and selected an arbitrator, while the
 evidence. plaintiff selected an arbitrator.

The evidence of Sherman's acts and declarations was, we think, inadmissible, and not without prejudice. It was manifestly introduced as evidence tending to show that the defendant deemed itself liable. But an offer to arbitrate is not an admission of liability. Besides Sherman's admission, if he had made any, could not be deemed the admission of the company. "The representations, declarations, and admissions of the agent of a corporation, stand upon the same footing with those of the agent of an individual." *Angell & Ames on Corp.*, Sec. 309, and cases cited. Sherman, as appears, was not only not connected with the train which caused the accident, but what he said and did about it was at an entirely different time and place. The tort of a principal cannot be proved by evidence of the statements of an agent of such a character. *Mich. Cen. R. R. Co. v. Carrow*, 73 Ill., 348; *Frost v. Second Ave. R. R. Co.*, 72 N. Y., 542; *Verry v. B., C. R. & M. R. R. Co.*, 47 Iowa, 549.

Mundhenk v. The C. I. R. Co.

Whether, if the liability of the company had been conceded, and Sherman had been authorized to settle for the injury, his admission as to the amount of damages sustained could have been shown as admissions of the company, we do not determine, as such question is not before us.

IV. There was evidence showing that one Bennett employed a veterinary surgeon to doctor one of the horses, and 4. — : — : paid him for it. Afterwards the plaintiff paid instruction. Bennett. It does not appear that Bennett as the agent of plaintiff, actual or assumed, employed the surgeon. The court instructed the jury that the plaintiff could not recover the amount paid unless he bought the account and took an assignment of it verbally or in writing.

There is no pretense that the plaintiff bought the account, or took an assignment of it. The instruction was based upon a theory wholly unsupported by the evidence. It was, therefore, calculated to mislead. And in giving it we think that the court erred.

V. The affidavit, served for the purpose of entitling the plaintiff to double damages, did not designate the place of the injury, otherwise than by showing that it was in 5. — : — : double damages: affidavit for amendment; service. Marshall county. The defendant objected to the affidavit upon the ground that it should have shown the place of the injury more specifically, but the court overruled the objection.

In this, we think, there was no error. It was said in *Mackie v. Railroad Co.*, 54 Iowa, 540, it is not essential that the affidavit served should contain anything more than a statement of the claim and the fact of the injury.

VI. The jurat to the affidavit served was in these words: "Sworn to before me and in my presence by H. W. Mundhenk, this 19th day of August, 1879.

JOHN CARNEY, *Notary Public.*"

Objection was made to the affidavit on the ground that the jurat was insufficient. The objection being sustained, the

* Mundhenk v. The C. I. R. Co.

plaintiff procured from the notary an amended jurat, and the affidavit with the amended jurat was then, against the defendant's objection, admitted.

The amended jurat is in these words:

"STATE OF IOWA, }
Marshall County. }

"Subscribed in my presence and sworn to before me by H. W. Mundhenk, on the 19th day of August, 1879. In testimony whereof I have hereto set my hand and notarial seal.

JOHN CARNEY,

Notary Public in and for Marshall County."

An affidavit may be amended if done within such reasonable time as not to cause essential injury to the other party. Code, § 248. The defendant in this case claims that if the amendment is allowed it will cause essential injury, because the defendant should have thirty days after the service of a proper affidavit to relieve itself from liability by paying single damages.

It appears to us, however, very clear that there was at least a *bona fide* attempt on the part of the plaintiff to bring himself within the provisions of the statute in respect to double damages, and we have no doubt the defendant understood that such was his design. We think, then, that in view of the statute allowing amendments, which we must presume was known to the defendant, we could not properly hold that the defendant was justified in disregarding the affidavit. In *Hallett v. Railroad Co.*, 22 Iowa, 259, an action like the present, to recover double damages, it was held that it was not error to allow the jurat to the affidavit to be amended.

VII. The notice of claim and accompanying affidavit were served by the plaintiff. The defendant insists that such service is without authority and void.

The statute does not provide how the service shall be made. In the absence of any provision, we think, it may be made by any person.

Decatur County v. Bright.

Some other errors are assigned, but the questions presented will not probably arise upon another trial.

For the errors pointed out the judgment must be

REVERSED.

DECATUR COUNTY V. BRIGHT ET AL.

1. **Bond:** ACTION ON: CONSIDERATION: NON-JOINDER OF PARTIES. In an action upon a bond given to secure the payment for certain lands, alleged to have been purchased by another, it was held that the evidence led strongly to the conclusion that the contract of purchase had never been completed; that if there was no mutually binding contract of purchase the bond would be without consideration; and that as other parties may have an interest in the determination of the question as to the validity of the contract, who have not been made parties to the record, no judgment could properly be entered in the case.

Appeal from Decatur Circuit Court.

FRIDAY, MARCH 24.

THE plaintiff commenced this action on the 2d day of October, 1879, claiming of the defendants the sum of one hundred and sixty dollars, with interest at ten per cent, from January 1st, 1879, on a bond, a copy of which is as follows:

"This indenture witnesseth that John Bright, his heirs, executors and assigns, are held and firmly bound unto the county of Decatur, and State of Iowa, in the penal sum of five hundred dollars, that he will on the 1st day of January, 1879, pay to the said county, for the use and benefit of the school fund of said county, the sum of one hundred and sixty dollars, as the one-third cash payment on the east half of the southeast quarter, section 16, township 67, range 24, west, and assume the payment of the balance due on a certain contract executed by J. B. Sanders on said land, amounting to three hundred and twenty dollars. This obligation to be null and void when the stipula-

tions therein set forth are fully complied with, otherwise to remain in full force and effect.

" Executed at Leon, Iowa, this 4th day of September, 1878.

JOHN BRIGHT.

" We, the undersigned, hereby bind ourselves, heirs, executors and assigns, in ~~the~~ penalty named in the above bond of John Bright, that the stipulations, therein set forth, shall be fully complied with.

HEED INGRAM."

The defendants answered as follows:

" 1. That the bond sued on in this case was made without consideration.

" 2. That there has been a payment of \$40 on the sum secured by said bond.

" Defendants further say that the bond in controversy was made on account of certain real estate, described in petition, which was sold without authority of law, and a certain note which was given without authority of law, and when it was given it was for the purpose of guaranteeing that one Samuel Bright would not remove his property from Decatur county, so as to endanger the collection of his note of one hundred and ten dollars, which is the indebtedness intended by the \$160 claimed in the petition; that said Samuel Bright has not removed his property; that it was illegally obtained and without defendant's knowledge and understanding that he should be responsible for the debts set out in the petition, and said matters were inserted in the bond by mistake and misunderstanding of the parties; and that the defendant is ignorant and illiterate, and can hardly read writing, and was misled by the plaintiff as to the contents of said bond.

" 4. The defendants further say that said bond is illegal and void, because the plaintiff had no authority to demand and accept the bond sued on for any purpose.

" 5. The defendants further say that the lands described in the petition were school lands and were sold by plaintiff with-

Decatur County v. Bright.

out securing the one-third part in cash, which never has been paid, and the money claimed in the petition is for the payment of said illegal and void contract, for sale of said land and is therefore void.

"Wherefore defendants demand that said contract be corrected in accordance with the statement of this answer, and judgment for costs and other relief."

Upon the filing of this answer the defendants moved the court to transfer the cause to the equity docket, and that it be tried upon depositions and written evidence. This motion was sustained. Afterwards the defendants filed an amendment to their answer as follows:

"1. That in the year 1865, or 1866, the plaintiff sold to J. B. Sanders the E $\frac{1}{4}$, S E $\frac{1}{4}$, section 16, township 67, range 24, Decatur county, Iowa, for the agreed price, under appraisement at 50 cents per acre, amounting to \$40, and said Sanders paid for the same, and entered into possession of the land, and made valuable improvements thereon to the amount of \$200.

"2. That the plaintiff failed to perfect the title to the land and refused, or was unable, to procure the title to the land from the State, and Sanders could not get the title.

"3. That afterwards, in 1875, one Samuel Bright undertook to purchase the land from the plaintiff, and executed his note for \$110 to plaintiff to procure the first payment to be made on the land, but for some cause failed to get the money on said note, although the said note is still held by the plaintiff.

"That afterward, in 1875, J. B. Sanders, failing to get the title to said land, sold and released to said Sam. Bright, all his interest in said lands, being the price paid on the original contract, \$40, and interest, and the improvements made, and under this claim Samuel Bright entered into possession of the said lands.

"That said Sanders does not now have, nor never did have, any other claim on said lands than that growing out of the original purchase in 1865 or 1866.

Decatur County v. Bright.

"Defendants ask that J. B. Sanders, Samuel Bright and their wives, and all parties claiming under them, be made parties to this suit, and their interest in said lands be foreclosed, and that plaintiff be required to pay back the original purchase price, and pay for the improvement made on the land, or in case the court finds a contract existing to support the bond sued on, that the land be first sold to satisfy said debt, and for such other relief as the defendants may be entitled."

The court rendered judgment against the defendants for \$184.84, and ordered that when the judgment should be paid it should operate as a discharge of the note and mortgage given by Samuel Bright to the school fund of Decatur county for \$110.40, dated September 15th, 1875. The defendants appeal.

The facts are stated in the opinion.

J. B. Morrison and *W. H. Robb*, for appellants.

No argument for appellee.

DAY, J.—The material facts in the case are substantially as follows: In the year 1866, J. B. Sanders contracted with De-

1. BOND: action on : consideration : non-joinder. catur county for the purchase of the eighty acres of land described in the answer, at the appraised price of 50 cents per acre, \$40 for the tract. Sanders paid the \$40, and entered into the possession of the land, and made improvements thereon of the value of \$200. When he made application for a patent, it was learned that the sale was void and that a patent could not be obtained. He then, in 1875, undertook to make a new contract with the county for the purchase of the land at \$6 per acre, \$480 for the tract. Being unable to raise the cash payment of one-third required by law, he arranged with Samuel Bright to take one-fourth of the land and make the first payment, \$160, after deducting therefrom the \$40 already paid, and the interest thereon, leaving of the first payment to be provided for, \$110.40.

Decatur County v. Bright.

Samuel Bright was to borrow this sum from the school fund and secure it by a mortgage on other lands, and then pay it over to the school fund for the balance of the cash payment due on the Sander's contract. In pursuance of this arrangement, Samuel Bright executed to the county, his note for \$110.40, with Herd Ingram, W. C. Cozad and Henry Bright, as sureties. He also executed a mortgage on certain lands to secure this note. The title to part of the mortgaged lands was not good, and the loan was refused. The note and mortgage were left with the county auditor in the hope that the title might be perfected, and the loan consummated. In the meantime, interest fell due on the note, which Samuel Bright paid. He failed to get the title fixed, and did not obtain any money on the note and mortgage. Sanders, after waiting some time, and not being able to raise the cash payment, wrote to the county auditor that he could not complete the contract, and asked to be released, and that the auditor sell the land to Samuel Bright if he could do so. Sanders also wrote to the auditor that he could not take the land but would sell his interest to Samuel Bright and be released. To this, the auditor replied, it was all right, and Sanders supposed he was released. Sanders then sold his improvements to Samuel Bright, and left the land. This occurred in November or December, 1875. The written contract between Sanders and the county auditor for the purchase of the land, is dated September, 15, 1875, but it was not acknowledged until October 29, 1878, and Sanders testified it was not signed by him until that day. Respecting the signing of this contract, Sanders testified as follows: "This was about November or December, 1875. I wrote to the auditor, and received the answer, and sold to Sam. I did not know anything more about it till the October term of the Circuit Court, 1878. The auditor called me into his office and said to me, 'you have sold out your interest in that land to Sam Bright, have you?' I said yes. 'Then sign this paper.' he says, 'and it will be all right.' I was in a hurry, court had

Decatur County v. Bright.

been called, and I signed the paper without reading it. I now see it was a contract of purchase for E $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, 67, 24, Iowa, at \$6. This is the only contract I signed of that kind, and did not know until to-day I had signed such a contract. The notes I signed for the two-thirds were to be left with the auditor and not used, unless I could raise the cash payment, and complete the contract, which I could not do, and supposed till to-day that my notes were null and void. I never paid my interest on the notes." It does not appear that any contract was made with Samuel Bright for the sale of the land. The sureties of Samuel Bright on the note of \$110.40 became apprehensive that they might be held for the payment of that note, and made preparations to sue out an attachment against Samuel Bright's property. To release these sureties and prevent the issuance of an attachment, John Bright, who is the father of Samuel Bright, executed the bond now sued upon. This bond, it will be observed, is for the payment of one hundred and sixty dollars, as the one-third cash payment on the lands referred to in the answer, and the assumption of the payment of the balance due on a certain contract executed by J. B. Sanders on said land, amounting to three hundred and twenty dollars. Now, it is evident, we think, if no contract, mutually binding, existed between Sanders and the county for the purchase of the land, there was, as between the defendants and the county, no consideration for the obligation sued upon. It would be manifestly unjust and inequitable to permit the county to recover from the defendants one-third the purchase price of the land, and at the same time repudiate the contract of sale, upon the ground that the contract had not been consummated. The evidence before us leads strongly to the conclusion that the contract of purchase was never completed. But, as both Sanders and Samuel Bright are, or may be, interested in the determination of this question, it cannot properly be decided without making them parties to the record. Upon the case, as presented to us, we think judgment cannot be en-

The State v. Weaver.

tered against the defendants. The cause will be reversed and remanded with leave to the plaintiff to make Sanders and Samuel Bright parties, if so advised.

REVERSED.

THE STATE V. WEAVER.

1. **Criminal Law: CONSPIRACY: THREATS BY ONE JOINTLY INDICTED.**
Where two persons were jointly indicted for murder, and there was no evidence tending to show a conspiracy between the two, or any accord or concert in feeling and action against the deceased, prior to the conflict resulting in his death, upon the separate trial of one, testimony of threats made by the other four or five months before the homicide, was incompetent.
2. ———: **DECLARATIONS OF DECEASED: BELIEF OF IMPENDING DEATH.**
To render the declarations of the deceased, in regard to the conflict which resulted in his death, competent evidence against the prisoner, it must be shown that they were made in the full belief of impending death.
3. ———: **STATEMENTS: FAILURE TO DENY.** Where one is under arrest, charged with a crime, his mere silence and failure to deny statements made in his presence tending to criminate him, cannot be interpreted as an admission of the truth of such statements.
4. ———: **CO-CONSPIRATOR: DECLARATIONS OF: INCOMPETENT.** One conspirator is bound by the declarations and acts of his confederate, but the declarations of a co-conspirator, made after the purposes of the conspiracy have been accomplished, are incompetent to establish the guilt of the accused.

Appeal from Greene District Court.

FRIDAY, MARCH 24.

THE defendant was jointly indicted with S. T. Horine for the murder of George W. Learned, and upon a separate trial was convicted of manslaughter. He now appeals to this court. The facts of the case, so far as they are involved in the questions decided, appear in the opinion.

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79 672
57 730
86 226
57 730
87 673
57 730
118 669
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121 403
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130 700
57 730
134 154

McDuffie & Howard and Russell & Toliver, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. Two witnesses were permitted to testify to threats made by Horine, who is jointly indicted with defendant, against the deceased. These threats were made four or five months before the homicide. There is no evidence tending to show that there was any conspiracy on the part of the two defendants against the deceased, or that there was any accord or concert in feelings and action against the deceased, prior to the conflict which resulted in his death. The evidence is clearly incompetent and its admission was prejudicial to defendant.

II. Declarations of the deceased in regard to the conflict which caused his death, made a few hours before he died, were admitted in evidence. To render declarations competent evidence against the prisoner, the law requires that it should appear they were made in the full belief of the deceased that he would not recover and that his death was impending. The *State v. Nash & Redout*, 7 Iowa, 387. We think the proof intended, under this rule, to establish a foundation for the admission of the declarations of the deceased, is insufficient. It is not made to appear that he believed that he would not recover and that he was near the approach of death. During paroxysms of pain which he suffered, he more than once declared that he could not endure his sufferings and that they would cause his death. An information for the arrest of the defendants was prepared by a justice of the peace to which the deceased was sworn. The justice testifies that at the time, referring to the information, he used this language: "Before God, not expecting to live until night, every word is true." Other witnesses who were present state his declaration in this form: "Not knowing that I may live till night, every word of it is true." After

2. ———: declarations of deceased: belief of impending death.

1. CRIMINAL law: conspiracy: threats.

this declaration his physician gave him encouragement that he would recover. At the time he made the particular declarations, admitted in evidence, it is not shown that he expressed the belief that he would not survive, and there is no ground for presuming that he entertained such belief. The declarations, we think, ought not to have been admitted in evidence, as preliminary proof does not sufficiently show that they were made in the full belief of his impending death.

III. The court directed the jury that "if you are satisfied by the evidence that Horine, in defendant's presence and hearing, did make statements concerning the transactions which tended to criminate him, and that defendant made no denial or explanation of the statements, you should consider them in determining the circumstances of the transaction, giving them such weight and importance as you think them fairly entitled to." Certain statements to which this instruction is applicable were made after the arrest of defendant and while he was in the custody of the officers. Under these circumstances his silence and failure to deny statements against him cannot be interpreted as an admission of their truth. *Commonwealth v. Kenney*, 12 Met., 235; *Commonwealth v. Walker et al.*, 13 Allen, 570; *Commonwealth v. McDermott et al.*, 123 Mass., 440.

IV. Evidence was admitted showing the declaration of Horine after defendant's arrest, and not in his presence, in regard to the conflict, and that certain articles were found at Horine's house marked with blood. The evidence ought not to have been admitted. One conspirator is bound by the declaration and acts of his confederate, and in no other case are acts and declarations of another competent to establish the guilt of an accused. But in this case, if there had been a conspiracy against deceased, its purposes had been accomplished and the conspiracy was at an end.

The evidence was therefore incompetent. This conclusion is

 Smith v. Hickenbottom.

based upon familiar elementary principles of the law and sound reason.

It is our opinion that, for errors pointed out, the judgment of the District Court ought to be

REVERSED.

 SMITH V. HICKENBOTTOM.

57	733
93	613.
94	343
57	733
110	9

1. **Guardian: PERSON OF UNSOUND MIND: EVIDENCE OF.** In an action under section 2272 of the Code, for the appointment of a guardian of the property of a person of unsound mind, the evidence showed the defendant was very old, very infirm, bodily, and that his mind had shared in his physical disability. The jury found that the defendant was of unsound mind. *Held*,
 1. That the verdict was sustained by the evidence.
 2. That evidence of a conversation had by the witness with defendant, was competent to show his mental condition, and that he felt his inability to properly manage and protect his property.
 3. That it was not the expression of an opinion for the witness to testify, by way of illustrating the imbecility of age, that the defendant "talked like a child."
 4. That in cases of this kind, after stating the facts upon which their opinion is based, non-experts may be allowed to give an opinion as to the defendant's soundness or unsoundness of mind.
2. **Assignment of Errors: NOT ARGUED: PRACTICE.** An assignment of errors not argued, will not be considered.
3. **Expert: HYPOTHETICAL QUESTION: CONFLICTING TESTIMONY.** Where an expert was asked a hypothetical question, based upon facts in relation to which there was conflicting and contradictory testimony, and which virtually required him to place himself in the jury box and weigh the testimony, the exclusion of the question was not error.
4. **Mind: UNSOUNDNESS OF: WHAT CONSTITUTES.** An instruction, which distinguished unsoundness of mind from idiocy on the one hand and lunacy on the other, was correct. The statute designates three classes for whom guardians may be appointed, and the latter class must differ from either of the others. If, then, there is such mental weakness that the judgment cannot be trusted in the management of business, a guardian should be appointed.

 Smith v. Hickenbottom.

Appeal from Jefferson Circuit Court.

FRIDAY, MARCH 24.

THIS is a proceeding under section 2272 of the Code, for the appointment of a guardian of the property of the defendant, Joseph Hickenbottom. The plaintiff is a son-in-law of the defendant. He bases his application upon the ground that the defendant is of unsound mind. The defendant for answer denies that he is of unsound mind.

There was a trial to a jury, which found that the defendant was of unsound mind, and the court appointed a guardian accordingly. The defendant appeals.

McCoid & West, for appellant.

Slagle & McCrackin and *D. P. Stubbs*, for appellee.

ADAMS, J.—The defendant, at the time of the trial, was seventy-eight years of age. It appears that until he was past
 1. GUARDIAN: seventy years of age, he was by no means deficient
 persons of
 unsound
 mind: evi-
 dence of. in business capacity, and succeeded in accumulat-
 ing considerable property. It does not, indeed, ap-
 pear, that at the time of the trial, he had wasted his property
 to any considerable extent. But he had become, bodily, very
 infirm, and his mind, without any question, had shared some-
 what in his physical disability. He seems himself at times
 to have been conscious of it, and expressed a wish that some-
 one would take charge of his property and relieve him from all
 care in respect to it. Some arrangement could doubtless have
 been effected, whereby his property and himself could have
 been properly cared for without the appointment of a guardian,
 and especially without litigation, if there had been harmony
 among his children. But one of the painful facts, which ap-
 pears from the record, is the want of such harmony. The tes-
 timony is very voluminous, as usually happens in a closely

Smith v. Hickenbottom.

contested case of such a character. The witnesses differ considerably, but, on the whole, we may say, that it appears to us, that the evidence sustains the verdict. We have all arrived at this conclusion, upon a separate reading, and it is unnecessary to set out and discuss the evidence in detail. It is claimed, however, that the court erred in the admission and exclusion of evidence and in giving instructions.

I. One Elizabeth Smith, a daughter of the defendant, was introduced as a witness, who testified in these words: "I remember a conversation with him (the defendant) last August, before this proceeding was instituted. I went to see him. He was sitting up and appeared like he was very much cast down. I shook hands with him and he turned into crying, and said the boys were not serving him right. I asked him why, and he said they were wasting his property, taking things from him; said he would like to have somebody come and take care of his property, that he could have the benefit of it in his old days to keep him." The defendant moved to exclude this evidence, but the court overruled the motion and he excepted.

We think that the evidence was not inadmissible. It tended, we think, in some slight degree, to show the defendant's mental condition. If he was laboring under a delusion in respect to his sons taking his property away from him, his statement tended to show that he was subject to delusion; and in any event, it showed that he felt unable to cope with his sons.

Some other objections are urged by the defendant's counsel, which we are not sure we fully comprehend. The evidence is said to be hearsay and very prejudicial. If the fact in question was as to whether the boys, so called, were taking the property, then evidence of anyone's statement that they were, would be hearsay, and not without prejudice to *them*. It is possible, indeed, that the boys, and not the defendant, are in reality making the defense in this case, but we are not allowed

Smith v. Hickenbottom.

to make such assumption and be guided by it in the application of the law.

II. The same witness testified in these words: "He said, while we were there, that the boys had not treated him right; said he had money and did not know what went with it; he would like to get some person to come and take care of his property, and then he turned in and talked like a child." The defendant objected to the last clause because it contained the expression of an opinion. The court overruled the objection and the defendant excepted.

In our opinion the evidence was not subject to the objection. It was not to be expected that the witness could repeat the defendant's words with entire accuracy, and if she could have done so, it might not have given an accurate idea of the defendant's state of mind. We can conceive that there was something in his manner and general appearance which impressed the witness, and which she intended to describe, when she said he talked like a child. It is not easy to describe the imbecility of old age. The witness used an illustration. Descriptions are often given in this way. They may be indefinite and inadequate, but they are not usually regarded as expressions of opinion.

III. Non experts were allowed, against the objection of the defendant, to give their opinion that he was of unsound mind.

In this we think that there was no error. They were allowed to do so only after stating the facts upon which their opinion was based. We see no reason why the same rule should not apply as in cases of insanity; and that non-experts may give an opinion in such cases upon the facts stated by them is well settled in this State, whatever may be the rule elsewhere. *Butler v. St. Louis Life Insurance Co.*, 45 Iowa, 97. The departure from the ordinary rule, which excludes opinions by non-experts, is deemed justifiable upon the ground that the facts testified to in respect to insanity, must often, in the nature of the case, convey to the jury a very inade-

 Smith v. Hickenbottom.

quate idea of the ultimate fact to be found by them, and upon the further ground that the insanity of a person can often be detected by a non-expert, who is familiar with the person, almost as readily as by an expert.

Mental weakness or imbecility, amounting to unsoundness, cannot always, and perhaps cannot usually, where it is not of a marked character, be adequately shown to a jury by a mere statement of facts. The difficulty, we think, is not less than in cases of insanity, which are not of a marked character. So, again, the value of technical knowledge in detecting imbecility, amounting to unsoundness, it seems to us, is not greater, and perhaps is less, than in detecting insanity.

IV. A physician was examined as an expert, and to him a hypothetical question was propounded. Certain facts and circumstances were supposed, and the witness was then interrogated in these words: "What, in your opinion, is indicated as to the state of mind of this individual by these conditions and circumstances named in the question, and by these facts if testified to?" The defendant objected to the question as not being true to the facts as stated by the witnesses. The court overruled the objection and the witnesses answered: "If these actions and manifestations were prominent without a physical cause, temporary or permanent, then there would be evidences of mental weakness." The admission of this evidence is assigned as error.

2. ASSIGN-
ment of
errors: not
argued.

Our rule is to consider no assignments of error which are not argued. All we find in the argument upon this assignment of error is in these words: "On page 70 a hypothetical question is admitted to Dr. Woods, which we urge is not true to the facts stated by the witnesses, and upon that an opinion is sought to be thrown into the jury box." This argument is nothing more in substance than a mere re-statement of the assignment of error. The facts supposed, related to the words and conduct of the defendant on certain occasions. They did not relate to all the words and conduct of the defendant as

 Smith v. Hickenbottom.

shown in evidence, nor was it necessary that they should. We do not know that this constitutes the defendant's objection. Possibly it is that one or more of the facts supposed are not sustained by any evidence. But if this is the point relied upon, the facts should have been pointed out. In the absence of any argument upon the point, we do not feel called upon to say more.

V. Another physician was examined as an expert and asked a question in these words: "Now, then, you will state to the jury if the symptoms and indications testified to by the witnesses were proved, and if the jury were satisfied of the truth of them, I wish you to state whether, in your opinion, having heard all the symptoms and indications, Joseph Hickenbottom was of sound or unsound mind, and if unsound what is the nature and character of that unsoundness?" This question was objected to by the plaintiff, and the objection was sustained. In this, we think, that there was no error. There were not only conflicting symptoms and indications, and to such an extent as to evince in some measure an indirect conflict of testimony, but there was in some instances a direct conflict of testimony. The witness was asked virtually to place himself in the jury box and weigh the evidence.

VI. The defendant assigned as error the giving of the 2nd, 6th, and 7th instructions. The 6th and 7th are the only ones specifically referred to in argument, and are the only ones which we shall consider. In the 6th instruction the jury was told that the proceeding was a friendly one, not designed for the plaintiff's benefit, but for the protection and good of the defendant. In the 7th instruction, the court undertook to define unsoundness of mind. The court said: "The words 'unsound of mind' as used in the statute, and in the petition, and as must be contemplated by your verdict in this case, do not mean utter and unmitigated madness, or absolute and hopeless idiocy on the one extreme,

3. EXPERT:
hypoetical
question:
conflicting
testimony.

4. MIND: un-
soundness of:
what consti-
tutes.

Smith v. Hickenbottom.

nor on the other such weakness and infirmity, even in extreme old age, as is liable to be influenced or imposed upon, nor the occasional belief of facts which no sane man would believe, provided there is still mind enough to discover the illusion or hallucination before it is acted upon, nor occasional spells or fits of delirium from sickness. The condition of mind, contemplated by these words, is beyond the latter, and may be within or short of the former of these extremes. The main, if not indeed the only, objects of this law and proceeding are the protection of the property and person of the defendant against the probable ill effects of their remaining under the control of a deluded mind, one believing and acting upon facts which have no existence but in the imagination. If, therefore, you find from a preponderance of the evidence that the condition of the defendant's mind is such as discloses incapability of exercising judgment, reason, and deliberation, of weighing the consequences of his acts and their effects, to a reasonable degree, upon his property, estate, family, and attendants, and his own person, it will be your duty to return a verdict that he is unsound of mind."

The objection urged to the instructions by the defendant is that they fail to give any proper definition of unsoundness of mind. He contends that unsoundness of mind is "a permanent adventitious insanity."

Without stopping to enquire whether there is any authority for such a definition we have to say that we do think it would be a proper one in this case. The statute provides for the appointment of a guardian of "an idiot, lunatic, or person of unsound mind." Three classes are designated, and we must presume that the latter class differs somewhat from either of the others. The definition insisted upon by the defendant, would make the latter class substantially identical with the second. We are aware that the word *lunacy* was originally used to denote periodical insanity, but it is not confined to that meaning now, and is generally regarded as having the

Smith v. Hickenbottom.

same extent of meaning as the word insanity. See Webster's Unabridged Dictionary. While, then, an idiot or lunatic is a person of unsound mind, a person may be of unsound mind and not be an idiot or lunatic. This was the view of the court below, and is beyond any question correct.

When we come to undertake to define precisely what is unsoundness of mind, within the meaning of the statute, we meet with great difficulty. Weakness is not necessarily unsoundness, but there may be a weakness, short of idiocy, either congenital or superinduced by disease or old age, that amounts to unsoundness. It is within the observation of every one, that in extreme old age the mental powers oftentimes nearly fade out. Where this is so, we have a clear case of unsoundness of mind as distinguishable from idiocy or lunacy. But what is the measure of that weakness which amounts to unsoundness? It is not easy to say in precise terms. The weakness which does not amount to unsoundness shades off into that which does. Yet the statute must be applied to each given case, and practically the difficulty is not a very great one. The object to be accomplished by the statute is easily comprehended, and that constitutes the jury's best guide. The mental weakness of old age may or may not open the door to delusions. Where it does the judgment is ordinarily, we presume, less to be trusted than where it does not. But whether delusions are present or absent, if there is such mental weakness that the judgment necessarily required in the management of the defendant's ordinary affairs cannot properly be trusted, and the just protection of his property demands the legal substitution of another's judgment, such substitution ought to be made. The 7th instruction given expresses substantially this idea, and in giving it, we think that the court did not err.

We have examined the entire case, so far as its presentation calls for an examination, and we have to say that we see no error.

AFFIRMED.

Hansen v. The American Insurance Company.

HANSEN V. THE AMERICAN INS. CO.

1. **Written Instrument: LOSS OF: SECONDARY EVIDENCE.** The burden of showing the loss of a written instrument is upon the party who seeks to introduce secondary evidence thereof, and before secondary evidence is admissible, it should clearly appear that proper efforts had been made to find the written instrument. A thing cannot be said to be lost or mislaid for which no search has been made.
2. **Insurance: PROOFS OF LOSS: FALSE STATEMENTS.** Where the agent of the insurance company fully knew the purpose for which a certain building was used and occupied at the time it was destroyed by fire, this would not excuse the insured for knowingly making false statements, as to such use and occupation, in the proofs of loss.
3. **New Trial: INSTRUCTIONS: JURY.** Where the jury disregard, or fail to follow the instructions of the court, upon a point concerning which there was no conflict in the testimony, a new trial should be granted.

Appeal from Dubuque District Court.

FRIDAY, MARCH 24.

ACTION on a policy against loss or damage by fire. The answer consisted of a general denial and certain special defenses, which are sufficiently indicated in the opinion. Trial by jury; verdict and judgment for the plaintiff, and the defendant appeals.

J. C. Longueville and Neff & Stearns, for appellant.

J. H. Shields, for appellee.

SEEVERS, CH. J.—I. The policy of insurance is based on a written application signed by the plaintiff. It is stated therein she owned the fee simple title to the premises insured. It is conceded she did not have such title but that the same was in one Langworthy. It is claimed, however, the agent of the defendant who filled up the application had full knowledge as to the condition of the title

1. WRITTEN
instrument:
loss of: sec-
ondary evi-
dence.

Hansen v. The American Insurance Company.

and that the knowledge of the agent was notice to the company. Conceding this to be so, and without considering its legal effect, we think there is no doubt it devolved on the plaintiff to establish she had an insurable interest. This she undertook to do, and when on the stand as a witness testified she purchased the property insured of Langworthy, and that he gave her a writing stating the terms and conditions of the purchase. Thereupon occurred the following: "Ques. Where is that contract? Ans. Oh! I don't know. Ques. Where is it; can you find it? Ans. No; not now. Ques. It is lost, is it? Ans. Yes, sir; it is lost? Ques. Have you looked for it, and can't find it? Ans. No. Ques. That is, can't find it? Ans. Mr. Langworthy was the last time here and he said I paid him some money."

As we understand, the plaintiff testified she had not made any search for the writing and failed to give a responsive answer to the last question.

Mr. Langworthy was introduced as a witness by the plaintiff and asked to state the terms and conditions of the sale of the property. To this the defendant objected, on the ground that the proper foundation had not been laid for the introduction of secondary evidence. The objection was overruled and the defendant excepted. Whereupon the witness proceeded to state the terms and conditions of the sale which were contained in the writing. Such evidence tended to show the plaintiff had an insurable interest in the property described in the policy. In this, we think, there was error. The rule is well established that before evidence can be introduced, showing the contents of a written instrument, it must appear such instrument, for some sufficient reason, cannot be produced. A thing cannot be said to be lost or mislaid for which no search has been made. *Howe Machine Co. v. Stiles*, 53 Iowa, 424.

It is said the plaintiff is a German, understands the English language imperfectly, and that by the negative answer to the question, "Have you looked for it, and can't find it?" She

Hansen v. The American Insurance Company.

meant she could not find the written contract. If this is so, why did she fail to respond to the direct question to that effect put by her counsel. He must have understood, to say the least, it was left in great doubt whether a search for the paper had been made. We do not think the ingenious theory of counsel should be permitted to prevail. The burden was on the plaintiff to show the loss of the written contract and the evidence should be reasonably clear and not susceptible of any other construction than that proper efforts had been made to find the written instrument.

II. We are embarrassed in the consideration of the other errors assigned, because the point is made by the appellee that the abstract fails to state all the evidence is contained therein, and the inclination we entertain the point is well taken. In view, however, of a re-trial, and upon the supposition all the evidence is before us, we deem it proper to say the policy provides that "any fraud or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under the policy." The plaintiff insisted the proofs of loss were sworn to by her, and it was there stated the building insured and destroyed or damaged, was "occupied for the following purpose, to-wit: for dwelling-house purposes by one Lullig and Khenschrot, and for no other purposes whatever." The court instructed the jury if the plaintiff knowingly made any false statement in making proofs of loss, with intent to defraud the defendant, she could not recover. When on the stand as a witness the plaintiff testified the persons above named occupied the house at the time of the fire, and that she knew "Khenschrot had a little grocery, and that he was selling whisky, beer, and cigars there." To our minds there is no escape from the conclusion the plaintiff knowingly made a false statement in the proofs of loss. If we understand counsel for the plaintiff he does not claim the premises were not occupied as a saloon, and that the plaintiff so knew, but his point is that such an occupation

2. INSURANCE:
proof of loss:
false state-
ment.

Hansen v. The American Insurance Company.

was known to the agent of the defendant, and that the latter was bound thereby. This may be so. Nevertheless, the plaintiff should have stated the facts correctly in the proofs of loss. The jury, under the instructions of the court, should have found for the defendant, and, therefore, a new trial should have been granted.

III. The court instructed the jury that the occupation of the building as a saloon increased the risk and avoided the policy, unless such occupation was waived by some act done by some one authorized to waive the conditions of the policy. That the receiving of a part of the premium coming due after the change in the occupancy would be a waiver, but receiving such premium at the time the policy issued would not be a waiver. There was but a single payment of a part of the premium, and that was made after the policy issued. The court further instructed the jury if such a payment was made on a note, which was the individual property of Beck, the agent of the defendant, then the collection thereof would not amount to such waiver. The only evidence tending to show to whom the money so paid belonged was that of Beck, and he testified it was his individual property. Had the jury followed the instructions their verdict must have been for the defendant, and for this reason a new trial should have been granted.

REVERSED.

BRADSHAW V. HURST ET AL.

1. **Homestead: TEMPORARY ABANDONMENT: EVIDENCE OF.** The owner of a homestead left the same for a temporary purpose, and went to the State of Kansas with her husband and kept house and abode there, but without any intention of permanently residing in Kansas. About a year later she died in Kansas, and her husband died there a few months later. *Held*, that her homestead rights still continued, notwithstanding the temporary abandonment; and that as her husband's distributive share in her estate was not set off to him during his lifetime the homestead was not liable for his debts, but descended to the children exempt from any antecedent debt of their parents or their own.

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891	319
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96	333
368	46
57	745
104	298
57	745
116	244

Appeal from Jefferson Circuit Court.

FRIDAY, MARCH 24.

THE petition states the plaintiff is administrator of the estate of L. Hurst, and that the personal property is insufficient to pay the indebtedness. The relief asked is an order empowering the plaintiff to sell certain real estate, which it is claimed belonged to the said Hurst at his death. The defendants are heirs at law of the deceased and state in the answer that Margaret Hurst was the wife of L. Hurst. That she died before he did and that she was the owner in fee simple of said real estate; that the same was her homestead at her death, and that said L. Hurst continued to hold said premises as his homestead until he died, therefore the same descended to the defendants free from the debts of either of their ancestors. The plaintiff replied that long prior to the death of said Margaret, the premises had been abandoned as a homestead, and that L. Hurst, after the death of Margaret, elected to take one-third of the property in lieu of his homestead right. Trial to the court, a finding of facts and judgment for the defendants. The plaintiff appeals.

D. P. Stubbs, for appellant.

McCoid & West, for appellees.

 Bradshaw v. Hurst.

SEEVERS, CH. J.—In substance but a single question is presented by counsel for determination, and that is whether there was an abandonment of the homestead. The evidence is not before us. We therefore are bound by the facts found. The facts bearing on the question above stated are:

1. HOME-STEAD: temporary abandonment: evidence of.

“L. Hurst and wife, Margaret, left their homestead, described in the application herein, on the —th day of September, 1877, for a temporary absence, and after a few week’s traveling, kept house and abode in Parsons, in the State of Kansas, until they both died, the doctor going into the drug business at that place, and voting and becoming a citizen there. The date of his intention to become a citizen, or of his citizenship there, does not appear. Nor does it appear what knowledge Margaret Hurst had, or that she had any knowledge, of the doctor’s intention to become, or the fact of his becoming, a citizen of the State of Kansas. She did not intend to abandon her homestead described, or to become a permanent resident of Kansas, or to change her residence from the State of Iowa, and intended her stay away from the homestead to be but temporary.

L. Hurst, deceased, died without applying for, or having his share in fee, or any share in the premises described, admeasured, and same never has been set off to him in severalty, but he was, after Margaret Hurst’s death, appointed guardian of the persons and property of the defendants and, at the time indicated by the clerk’s certificates, filed the papers and petitions hereto annexed as exhibits “A.”

The papers referred to show that L. Hurst filed a petition in the proper court, which was sworn to in Kansas, stating that the defendants, his wards, inherited a two-thirds interest as heirs of their mother, Margaret Hurst, and that it would be to their interest to sell the said interest. Such an order was asked and granted. Mrs. Hurst died in Kansas in September, 1878, and her husband in January following.

The burden, under the issue, was on the plaintiff to show an abandonment of the homestead. *First Nat. Bank of Davenport v. Baker*, ante, p. 197. As the Hursts left Iowa for a temporary purpose, an intention to return and occupy the homestead must have existed. Mrs. Hurst did not intend to abandon her homestead or become a permanent resident of Kansas. It, therefore, follows that at her death she was a citizen of Iowa and entitled to her homestead, unless previous to her death her husband became a citizen and resident of Kansas, and Mrs. Hurst's residence or citizenship became the same as that of her husband. It will be conceded the residence, citizenship, or domicile of a married woman is ordinarily the same as that of her husband. But we have seen her husband left Iowa for a temporary purpose and that the intent to return existed. He, therefore, continued to be a citizen of Iowa until a contrary intent was formed and he acquired a residence in Kansas. A citizen of this State does not lose his rights incident thereto until he becomes a resident of another State with an intent not to return or becomes a citizen of such State. The intention to return having existed must be presumed to continue until the contrary intent is formed. This is true as to the temporary character of the absence from this State. It will be presumed to be the same until the intent is formed to make such absence permanent. It will be conceded Mr. Hurst became a resident of Kansas, but when he became so does not appear. We think the burden was on the plaintiff to show that he became such resident before the death of his wife. As this does not appear we feel constrained to hold under the facts found that both L. Hurst and his wife were citizens of and entitled to homestead rights in this State.

The statute provides "upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of by law." Code, § 2007. "The setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a

Stafford v. The City of Oskaloosa.

disposal of the homestead as is contemplated in the preceding section." Code, § 2008. Upon the death of either husband or wife there cannot thereafter be an abandonment of the homestead by the survivor if the title was in the deceased, except by a setting off of the distributive share of such survivor in the real estate of the deceased. *Burdick v. Kent*, 52 Iowa, 583.

As no such setting apart was made the homestead descended to the defendants at the death of their father, exempt from "any antecedent debts of their parents or their own." Code, § 2008.

AFFIRMED.

57	748
78	808

57	748
83	644

57	748
108	632
1108	635

57	748
115	19

57	748
136	869

57	748
138	454

STAFFORD V. THE CITY OF OSKALOOSA.

1. **Evidence: NEGLIGENCE AND CARE: VERDICT.** *Held*, that the evidence in relation to the defendant's negligence and the plaintiff's care, was sufficient to authorize the jury, without passion or prejudice, to find for the plaintiff.
2. **Damages: PERSONAL INJURIES: PREJUDICIAL ERROR.** Where, in an action for personal injuries, the court instructed the jury that their verdict might be for a sum much larger than the amount actually claimed, the instruction was erroneous, and to authorize this court to disregard the error, it should clearly appear that no prejudice resulted therefrom.
3. **Municipal Corporations: STREETS: NEGLIGENCE.** Where a street has been opened for public use and travel throughout its entire width, it then becomes the duty of the city to keep it in a reasonably safe condition for the entire width thereof from sidewalk to sidewalk.
4. **Damages: EXPENSES FOR: MEDICAL TREATMENT: PROOF OF.** Where there was no evidence tending to show the expenses incurred by plaintiff for medical care and treatment, an instruction authorizing the jury to allow damages for such expenses, was erroneous.
5. —: **NEGLIGENCE: KNOWLEDGE OF.** The knowledge, or want of knowledge, on the part of the plaintiff that his friend, who was driving

Stafford v. The City of Oskaloosa.

when the accident occurred, was an habitually careless driver, is immaterial. If his friend was negligent on this occasion, he cannot recover.

6. **Jury: MISCONDUCT OF: VERDICT SET ASIDE.** The evidence in relation to the alleged misconduct of a juror considered. *Held*, that while it does not appear in this case that any wrong was intended or any prejudice wrought, prudence and a desire to secure the pure administration of the law require that the verdict be set aside.

Appeal from Mahaska Circuit Court.

FRIDAY, MARCH 24.

ACTION to recover damages for personal injuries sustained by plaintiff, on account of an obstruction in a street of the city, which caused plaintiff to be thrown from a sleigh in which he was riding. There was a verdict and judgment for plaintiff in the sum of \$5,500. Defendant appeals.

M. E. Cutts, T. H. Davenport and Lafferty & Johnson, for appellant.

John T. Lacy and Bolton & McCoy, for appellee.

BECK, J.—I. A sleigh in which plaintiff was riding with a friend, in the city of Oskaloosa, was turned over by a small mound in the street, which had been made by the street commissioner depositing the earth removed in cleaning the street crossing. Plaintiff suffered very severe injuries by the fall, from the fracture of a bone of the thigh, which will, probably, cause him to be a cripple for life. There is no dispute, or at least no conflict in the evidence as to plaintiff's injuries, and as to the fact that the sleigh was turned over by reason of being driven upon the little mound of earth. The contention of the parties involves the negligence of the defendant in permitting the mound to remain, and the want of care of plaintiff's friend, who was, at the time, driving the horse hitched to the sleigh. Various objections to the judgment, based upon alleged erroneous rulings of the court, are discussed by coun-

Stafford v. The City of Oskaloosa.

sel. Those which we think demand our attention will be considered in the order we find them discussed in the printed argument of defendant's counsel.

II. Counsel insist that the evidence fails to support the verdict, especially that there was no sufficient proof of defendant's negligence and plaintiff's care. We cannot concur in this conclusion, but are of the opinion that there was evidence upon these branches of the case sufficient to authorize the jury, in the exercise of their discretion, without passion or prejudice, to find for plaintiff.

1. EVIDENCE:
negligence
and care:
verdict.

III. The court in the first instruction informs the jury that plaintiff claims damages in the sum of \$15,000, and in another instruction directs them that their verdict may be in any sum less than \$15,000. The original petition claims damages in the sum of \$5,000.

2. DAMAGES:
personal in-
juries: preju-
dicial error.

An amended petition for the same injuries, set out in the original petition, claims to recover \$10,000. There is no allegation that the sum claimed in the amended petition is in addition to the claim first made. Indeed, the language of the last pleading is to be understood as alleging that the claim for \$10,000 damages covers all the injuries sustained by plaintiff. The court therefore erred in the instructions referred to above. It may not clearly appear that the error in fact wrought direct and certain prejudice to defendant. To authorize us to disregard the error it should clearly appear that no prejudice resulted therefrom. See case cited in 2 Withrow & Stiles' Digest, p. 813, section 162. In view of the fact that the judgment must be reversed on other grounds, we need not determine whether the record fails to show that no prejudice resulted from the error.

IV. An instruction holds that it is the duty of the city to keep its streets, which are opened to public use, in a reasonably safe condition "for the entire width thereof from sidewalk to sidewalk." This rule we think is correct. See *Rusch v. Davenport*, 6 Iowa,

3. MUNICIPAL
corporations:
streets: neg-
ligence.

Stafford v. The City of Oskaloosa.

455; 2 Thompson on Negligence, 766. If a street be opened for public travel for but a part of its width and the other part is not in a condition to be used by the public, the city would not be chargeable with negligence for failing to improve the whole of the street, or for accidents occurring to those attempting to use the part not improved. But no such case is presented by the record before us. The street for its whole width was opened for public travel. It was, therefore, the duty of the city to keep it reasonably safe for its entire width.

V. In the eighth instruction the jury were directed to consider, in estimating damages, the expenses incurred by plaintiff

4. DAMAGES: excuse for: medical treatment: proof of. iff for his treatment by surgeons and physicians. There was no evidence whatever tending to show the expenses so incurred by plaintiff. The instruction, therefore, in authorizing the jury to allow damages for such expenses is erroneous. See *Reed v. C., R. I. & P. R. Co.*, ante, p. 23.

VI. Evidence was introduced tending to show that plaintiff's friend, who was driving when the accident happened, was

5. —: neg- ligence: knowledge of. habitually a careless driver. In the second instruction asked for by plaintiff, the jury are informed that the evidence was admitted to show notice to plaintiff of his friend's careless manner of driving. We think the evidence was not admitted for that purpose, for if the driver was negligent plaintiff could not have recovered whether he did or did not have notice of prior negligence, or habits of negligence, of the driver. The fourth instruction expresses the thought that the knowledge of plaintiff of the careless habits of the driver was an element to be considered in determining whether these "careless habits" supported the defendant's defense. We think the drivers "habits of carelessness" had nothing to do with the case further than as tending to show that the driver was negligent when the accident happened.

Stafford v. The City of Oskaloosa.

The jury could more readily infer negligence on that occasion, if the driver was habitually careless, than if he had always been prudent.

The want of knowledge on the part of plaintiff, of the driver's carelessness, would not secure him the right to recover, notwithstanding the driver's want of care. The instructions in these respects are erroneous.

Other instructions given to the jury, we think, are correct. The instructions asked by defendant and refused were, so far as they are correct, covered by the instructions given.

VII. The defendant moved to set aside the verdict and for a new trial for, among other reasons, the misconduct of one of the jurors. The charge of misconduct is based upon the following facts, as shown by the proof, about which there is no dispute.

6. JURY: misconduct of:
verdict set
aside.

During the trial a Sunday intervened. A juror was desirous of visiting his home and was informed by one of the attorney's of plaintiff that, if he would stay at the house of the attorney until morning, he would be taken home by the attorney, who intended, with his wife, to make a visit in that neighborhood. To this he assented. The next day the juror and the attorney, with his wife, pursuant to this arrangement, went together in the attorneys conveyance to the juror's home, a distance of about sixteen miles. It was then made known to the juror that the visit was pursuant to a prior arrangement between the attorney and the juror's wife in order to celebrate the anniversary of the juror's birth. The attorney brought a chair with him, which he presented to the juror. Other friends were present at the juror's house. After spending the day in social intercourse the juror returned with the attorney and his wife, and slept at their house that night. It is shown that no conversation was had in regard to the case, and that the juror and the attorney and their families had been a long time friends. We discover no evidence authorizing the con-

clusion that either the juror or the attorney intended any wrong. The good character and high respectability of neither are questioned.

We are united in the opinion that the verdict ought not to stand in view of the transactions and association between the attorney and juror while the trial was pending. It would be extremely unsafe for the pure and correct administration of the law, through trial by jury, to permit such transactions. In this case the high characters of the juror and attorney may offer an assurance that no wrong was done and no prejudice wrought. But the transactions were in the way of temptation, which the law will not permit jurors and attorneys to pursue.

While good men, strong to resist temptation, may do no evil by such a course of conduct, weaker men may fall. The law has but one common rule to be applied to the good and bad, to the strong and the weak.

To sanction the transaction in question would bring disgrace upon the administration of the law. There is absolute safety in the rule we adopt; there is danger in a different one. "Prudence and a desire to secure a pure administration of the law demand that we adhere to it." *Ryan v. Harrow*, 27 Iowa, 494.

It is well said in *Bradbury v. Coney*, 62 Me., 223 (225), a case involving the question of the misbehavior of a juror, that "in the trial of a cause the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so that they should be free from the suspicion of prejudice."

The facts of this case distinguish it from *Koester v. The City of Ottumwa*, 34 Iowa, 41. The intercourse between the juror and attorney in that case was brief and trifling, when compared with the intimate association and transactions disclosed by the evidence found in the record before us. That

 Conwell v. House.

case went to the very verge of indulgence to jurors and attorneys; we can go no further.

For the errors pointed out in the foregoing discussion, the judgment of the Circuit Court must be

REVERSED.

57 754
107 19.

 CONWELL V. HOUSE ET AL.

1. **Trial De Novo: WHAT ABSTRACT MUST SHOW.** A case will not be tried *de novo* in this court, unless the abstract shows affirmatively that it contains all the evidence offered and admitted in the court below. A recital of the certificate of the judge, that all the evidence is contained in the transcript, does not amount to a showing that all the evidence is presented in the abstract.

Appeal from Ringgold District Court.

WEDNESDAY, APRIL 4.

ACTION in chancery. There was a decree in effect dismissing plaintiff's petition and granting the relief prayed for in a cross-bill filed by defendants. Plaintiff appeals.

Askern Bros., for appellant.

Laughlin & Campbell, for appellees.

BECK, J.—The petition shows that plaintiff became the owner of certain lands under a sheriff's sale and deed, made upon a judgment against one of the defendants, who is now in possession of the land, and converting to his own use the crops raised upon it, which belong to plaintiff. It is alleged that defendant is insolvent and an injunction is prayed for to restrain

him from further appropriation of the crops, and a decree is also prayed for giving plaintiff the possession of the land and of the crops.

The other defendant, who is the wife of the defendant against whom the judgment was rendered under which plaintiff claims title to the land, answered the petition and alleges that she is owner of the land, that it was bought with her property, and that a deed was executed to her for the land by her husband. She makes her answer a cross-bill and prays that the title to the land may be quieted in her. The allegations of the pleadings need not be further recited. The case is triable *de novo* in this court, if it be in a condition to be tried here at all.

II. Counsel for defendants insist upon the point that the case cannot be reviewed in this court for the reason that the abstract fails to show that it presents all the evidence upon the trial in the court below. The position of defendants' counsel is well taken. The abstract does not purport to contain all the evidence upon which it was tried in the District Court; a statement to this effect is nowhere found. The abstract does contain a copy of the certificate of the judge, affixed to the transcript, showing that all the evidence is contained in the transcript. But it is not shown by the certificate that the *abstract* contains all the evidence. The certificate does not aid plaintiff. We have heretofore twice held that a copy, or a recital of the judge's certificate, is not alone sufficient to show that the abstract contains all the evidence. *Overholt et al. v. Esmay et al.*, 54 Iowa, 748; *Cassady, Administrator, v. Spofford et al.*, ante, p. 237.

The abstract should show that it contained all the evidence certified by the judge. The recital or copy of the judge's certificate does not amount to a showing that all the evidence is presented to us.

1. TRIAL DE
NOVO : what
the abstract
must show.

Conwell v. House.

We have repeatedly held that we cannot try a case *de novo* unless the abstract shows that we have before us all the testimony offered and admitted in the court below.

AFFIRMED.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

DIMMICK V. HINKLEY ET AL.

MECHANIC'S LIEN: LIMITATION OF ACTION TO ENFORCE.

Appeal from Johnson Circuit Court.

MONDAY, JUNE 20.

THE plaintiff furnished to the defendants certain materials with which to erect a building upon premises owned by the defendant, Harriet M. Hinkley. The last item of said material was furnished March 30, 1876. The statement for a mechanic's lien was filed in the office of the clerk of the District Court, December 28, 1878. This action was brought March 6, 1879, to obtain judgment, and enforce a mechanic's lien for the amount due for said materials.

The defendants pleaded the statute of limitations. The cause was referred to a referee, who found that the lien was not barred. The Circuit Court, upon exceptions filed, set aside that part of the report, and held that the lien was barred. Plaintiff appeals.

Bonorden & Ranck, for appellants.

Edmonds & Hindman and *Slater & Ewing*, for appellees.

ROTHROCK, J.—The sole question to be determined is, was the right to enforce the mechanic's lien barred by the statute of limitations. The precise question involved was determined by this court in *Squier v. Parks*, 56 Iowa, 407. Following that case the judgment herein must be

AFFIRMED.

ON REHEARING.

ROTHROCK, J.—Counsel for appellant, in a petition for rehearing, insist that the question in this case is different from that involved in *Squier v.*

Park, 56 Iowa, 407, because in that case the contest was between the holder of the mechanic's lien and a mortgagee of the owner of the land, while in this case, the controversy is between the holder of the mechanic's lien and the owner of the land. Counsel say they want a construction of section 2137 of the Code, or rather that part of it which provides that a failure or omission to file the lien within the time fixed shall not defeat the lien, "except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for a lien was filed." If a little attention had been given to the statement of facts in the case of *Squier v. Parks*, *supra*, it would have been seen that while it is true the plaintiffs in that case were mortgagees, their mortgage was executed before the material was furnished which was the basis of the mechanic's lien. They are, therefore, not within the exception of the statute, and so far as the question of the statute of limitations was involved their rights were, under the statute, precisely the same as the rights of the owner. It is correct the facts in the two cases are not the same, but the principle involved is the same. The cases were considered together in consultation and disposed of at the same time and in the same way, because they were in principle the same. The former opinion is adhered to and the petition for rehearing must be overruled.

THE STATE V. MILLER.

CRIMINAL LAW: PRACTICE.

Appeal from Poweshiek District Court.

WEDNESDAY, MARCH 22, 1882.

INDICTMENT for perjury. Trial by jury; verdict guilty; judgment, and defendant appeals.

Smith McPherson, Attorney-general, for the State.

No appearance for defendant.

SEEVERS, J.—This case was submitted on a transcript. The evidence was struck out on motion at the last term. There is nothing before us except the indictment, instructions, judgment, and motion for a new trial. We think the indictment sufficient, the instructions correct, and the motion for a new trial correctly overruled.

AFFIRMED.

THE STATE V. BROWN.

CRIMINAL LAW: ASSAULT AND BATTERY.

Appeal from Guthrie District Court.

THURSDAY, MARCH 23, 1882.

THE defendant was charged, tried, and convicted by a justice of the peace of the crime of assault and battery. He appealed to the District Court, when he was again convicted, and appeals.

Smith McPherson, Attorney-general, for the State.

No appearance for the defendant.

SEEVERS, J.—This case is submitted on written transcript. It contains the information, proceedings before the justice, the judgment in the District Court, and a motion for a new trial, which was overruled. The motion was based on the insufficiency of the evidence, but no part thereof is contained in the transcript. The information is sufficient and there is no error shown by the record before us.

AFFIRMED.

THE STATE V. ESHELMAN.

CRIMINAL LAW: PRACTICE IN SUPREME COURT.

Appeal from Henry District Court.

FRIDAY, MARCH 24, 1882.

No appearance for appellant.

Smith McPherson, Attorney-general, for the State.

BUCK, J.—Defendant was convicted upon an indictment charging that he did maintain a nuisance by keeping a house wherein he permitted drunkenness, quarreling, fighting, and breaches of the peace, and was fined \$100 and costs. He has appealed to this court and superseded the judgment.

There is no appearance for defendant, and no errors are assigned. The

record before us contains the orders and judgment of the court had in the case, and the instructions to the jury. We have carefully examined the record and find no ground for interfering with the judgment of the District Court. It must therefore be

AFFIRMED.

INDEX.

ACTION.

1. **DISMISSAL OF: WHEN ALLOWED.** A cause is not finally submitted to the jury until they are directed to enter upon the consideration of the case, and where a party offered to dismiss his case before the jury were instructed, but after the court had indicated what the instruction would be, the offer should have been allowed and the cause dismissed. *Mullen v. Peck*, 430.

See **LIS PENDENS**, 1.

WILL, 2.

ADMINISTRATOR.

1. **FINAL SETTLEMENT: FRAUD.** The final settlement and discharge of an administrator is an adjudication binding upon all persons in interest, unless impeached for fraud or mistake. *Kows v. Mowery*, 20.
2. **PETITION TO SELL LANDS: BARRED.** Where the administration in this State is but ancillary to the original administration in a foreign State, and the law applicable to the case in that State is not shown, it will be presumed to be the same as our own; and where an application for the sale of real estate for the payment of the debts of the intestate is made long after the original administration, and after the time allowed by our statutes for establishing claims has expired, the proceedings will be barred. *Hadley v. Gregory et al.*, 157.
3. **ASSIGNMENT OF NOTES.** An administrator has power to dispose, by assignment, of the notes and due bills of the deceased, and in the absence of proof to the contrary it will be presumed this power was rightfully exercised, and that the assignee took them *bona fide*. *Marshall County v. Hanna et al.*, 372.
4. **TESTAMENTARY DISPOSITION: MUST BE IN WRITING: RULE APPLIED.** Where the defendant, without being appointed administrator, took and held possession of the decedent's property under a claim that by a parol agreement, entered into between himself and decedent, he became a trustee of the property, the rule that if the intended disposition of property be of a testamentary character, such disposition is inoperative, unless declared in writing, in strict conformity with the statutes regulating devises and bequests, approved and applied to the facts of the case. *Crispin v. Winkleman*, 523.

See **DOWER**, 1.

ADVERSE POSSESSION.

1. **BOUNDARY LINE: CLAIM OF TITLE.** Where parties agreed upon and fixed a boundary line between their premises, which by mistake was two rods north of the true line, and plaintiff took possession as owner, up to such agreed line, and held continuous possession thereof under a claim of title, for more than twenty years, he acquired a valid title to said strip by adverse possession. *Tracy v. Newton*, 210.
2. **EASEMENT: NOTICE OF.** Under the facts in this case the plaintiff, being affected with notice of the acquisition of an easement over the premises by the railroad company, could not acquire title to any portion of the right of way by adverse possession. *Stocumb v. The C., B. & Q. R. Co.*, 675.

AGRICULTURAL SOCIETY.

1. **PREMIUMS: HORSE RACING.** A county agricultural society has the authority, under section 1109, Code, to offer a premium to the winner at a horse race, or trial of speed, to be held on its grounds during its annual fair. *Delier v. The Plymouth County Agricultural Society*, 431.
2. ———: ———. Section 1114, Code, does not prohibit trials of speed or horse-racing, when under the control of the society, and as a means for improving the stock of horses. *Id.*
3. ———: **GAMBLING: PUBLIC POLICY.** The offering of a premium is not a bet or wager, and is not within the provisions of section 4028, Code, nor is it against public policy. *Id.*
4. ———: **WHO ENTITLED TO.** Where a party has control of a horse and enters him for the race in accordance with the rules of the society, paying the entry fee, he is entitled to the premium if earned. *Id.*
5. ———: **NOTICE AND PROTEST.** The notice and protest to the officers of the society by the plaintiff, as to the disqualifications of the horse making the best time, were sufficient to estop the society from paying the premium to its owner. *Id.*

APPEAL.

1. **NOT PERFECTED: JURISDICTION.** Where, on appeal, the clerk's fees for transcript were not paid or secured, it was held that the appeal was not perfected, and that the court below retained jurisdiction in the cause, and had power to grant a new trial. *Loomis v. McKenzie*, 77.
2. ———: **SUPERSEDEAS BOND: CLERK'S FEES.** The supersedeas bond secures the clerk's fees for transcript only in case the judgment below is, in substance, affirmed. *Id.*
3. ———: **ESTOPPEL.** The fact that the clerk ordered the execution returned on service of notice and filing of bond for appeal, did not estop the party from showing the appeal had not been perfected. *Id.*
4. ———: **PROCEDENDO: JURISDICTION: PRACTICE.** Where the Supreme Court assumes jurisdiction to entertain and dismiss an appeal not perfected, and *procedendo* is issued, it would not have the effect to set aside a new trial granted in the meantime in the court below, or to reinstate the judgment. *Id.*

5. **WAIVER OF.** Under the facts in this case, it was held that the appellant had not waived his right of appeal. *Jewell v. Reddington*, 92.
6. **AMOUNT IN CONTROVERSY: TENDER.** Where, before the trial in a justice's court, a certain amount was tendered but not accepted, and trial was had: *Held*, that the portion of the claim not tendered was the amount in controversy under the law limiting appeals. *Young v. McWaid*, 101.
7. ———: **CERTIFICATE OF JUDGE.** The amount actually in controversy being less than one hundred dollars, the appeal cannot be entertained without the certificate required by section 3173 of the Code. *Fisher v. Lane*, 334.
8. **WHEN ALLOWED: FINAL ORDER.** The order of forfeiture determined the defendant's liability on the bond, and was, in this case, a final order, from which the defendant could appeal. *The State v. Conneham*, 351.
9. **CERTIFICATE OF JUDGE.** Where the amount in controversy, as shown by the pleadings, was less than \$100, and no certificate of the trial judge was given, the appeal must be dismissed. *Thompson v. French*, 359.

See JUSTICE OF THE PEACE, 1.

PRACTICE, 16.

ASSESSMENT.

See MUNICIPAL CORPORATIONS, 9, 11.

TAXATION, 1.

ASSIGNEE AND ASSIGNMENT.

1. **OF CHOSE IN ACTION: POSSESSION.** The provisions of section 1923, Code, do not apply to the assignment of a chose in action, where the owners hold only the possession of a right. *Howe & Co. v. Jones et al.*, 130.
2. **EVIDENCE: VARIANCE: FRAUD.** The variance of evidence as to the consideration for an assignment, and evidence of fraud in the assignment, considered: *Held*, not sufficient to defeat the assignment. *Id.*
3. **BY PAROL: STATUTE OF FRAUDS.** The parol assignment, clearly and fully established, of a chose in action, as the portion of a judgment, is sufficient. It is not rendered void by section 1923, Code, nor is it, where payment is shown, within the statute of frauds. *Id.*
4. **COUNTY MAY TAKE.** A county has the legal capacity under some circumstances to take notes by assignment. The burden of showing lack of authority in any case is upon the one denying it, and unless established it will not avail by way of abatement of an action. *Marshall County v. Hanna et al.*, 312.
5. **ACTION BY: COUNTER-CLAIMS: DEFENSE TO.** Plaintiff, as assignee, brought suit upon an injunction bond executed by defendant to one M. Defendant set up certain promissory notes given by said M. to defendant, and also a judgment against M. and in favor of defendant, as a set-off and counter-claim. *Held*:
 1. That the counter-claims were properly pleaded as against the assignee.
 2. That the plaintiff had the right to show that the notes were obtained by duress, and that the judgment was void for want of

jurisdiction in the court rendering it. That the plaintiff, as assignee, could assert the same defenses to the counter-claims that M. could have done. *Miller v. City of Centerville et al.*, 640.

See **BANKRUPTCY**, 1.

LEASE, 1.

MORTGAGE, 5.

ATTACHMENT.

1. **OF HOUSEHOLD GOODS: NOTICE OF.** Where household goods belonging to the wife were delivered to a railroad company for shipment by the husband, and were attached while in the defendant's depot, in a suit against the husband, and notice thereof was duly given to him while so acting as the agent of his wife, and in time to assert a right to the goods, *held*, that the law would recognize the husband as the wife's agent in transactions relating to the removal of their household goods; that she could not recover for failure to deliver the goods; and that the verdict was so in conflict with the instructions and the testimony it should have been set aside. *Furman v. The C., R. I. & P. R. Co.*, 42.
2. **FRAUD: EVIDENCE.** Where it does not sufficiently appear from the evidence that the attachment debtor purchased the goods in question, with the intention of defrauding his vendors, it will not enable them to reclaim the goods from the attaching creditor. *American Express Co. v. Smith & Crittenden et al.*, 242.
3. **INVALID LEVY.** To make a legal, valid levy upon personal property, the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass therefor. A levy under which the officer does not have actual control of the personal property levied upon, with power of removal, is invalid. *Rix & Stafford v. Silknitter*, 262.
4. **RELEASE OF: INTERVENTION.** A third person claiming ownership of personal property, attached in a suit to which he is not a party, who has recovered actual possession of the property, under sections 2996, 2997, Code, may intervene in the attachment suit, by virtue of section 3016, Code, and have his rights to the property adjudicated. *Tuttle v. Wheldon et al.*, 304.

See **LANDLORD AND TENANT**, 1.

PENSION, 1.

ATTORNEY.

1. **SPECIAL CONTRACT: EVIDENCE: VERDICT.** Where the evidence produced did not tend to show that there was a special contract of hiring an attorney for a special purpose, as alleged, the jury were properly directed to return a verdict for the defendant. *Bennett v. Phillips*, 174.
2. **DAMAGES: ATTORNEY'S FEES.** Where there was no evidence of the amount paid, or agreed to be paid, as attorney's fees in defending the prosecution, an instruction including such costs in the measure of damages was erroneous. *Parkhurst v. Masteller*, 474.

BANKRUPTCY.

1. **STATE COURTS: ACTION BY ASSIGNEE.** An assignee in bankruptcy may maintain an action in the State courts to recover the property of the es-

tate, when the right thereto does not depend upon the provisions of the bankrupt law. *Wetmore v. McMillan et al.*, 344.

2. **NEW PROMISE TO PAY DEBT: DISCHARGE.** Where a bankrupt, after the adjudication of bankruptcy and before his discharge, makes an express new promise to pay an original debt, such promise will be binding upon him after his discharge. *Knapp v. Hoyt et al.*, 591.
3. ———: **EVIDENCE: DISCHARGE IN BANKRUPTCY.** A bankrupt prior to his discharge said to a creditor that "if he got his discharge he would be in shape to pay and would pay" a certain debt. *Held*, that this constituted an express promise to pay, and took the debt out of the discharge in bankruptcy. *Id.*

See INTERVENTION, 1.

BILL OF EXCEPTIONS.

See PRACTICE, 9, 18.

BOARD OF SUPERVISORS.

1. **CONSTRUCTION OF DITCH: INJUNCTION.** Where the petitioners for the construction of a ditch, join in an action to restrain the collection of the tax levied upon their property to reimburse the county therefor, the action of the board of supervisors in paying more for such construction than the original estimates and specifications called for, in the absence of fraud, will not be reviewed; and after the county has paid for the ditch, so constructed, the objection that the work was not done in accordance with the specifications, comes too late. *Noyes et al. v. Harrison County et al.*, 312.
2. **ALLOWANCE OF CLAIMS: WAIVER.** Where a claim was filed before the board of supervisors for medical attendance rendered to paupers upon the order of the proper township trustees, but was not certified by them to be correct, and the board considered the claim and allowed a portion of it without objection for want of such certificate, such action will amount to a waiver of the certificate, and will estop the county from setting up the want thereof, as a defense to the balance of the claim. *Bradley & Sherman v. Delaware County*, 552.
3. **CLAIM FOR UNLIQUIDATED DAMAGES: PROOF.** The presentation of a claim for unliquidated damages against a county to the board of supervisors, and demand for payment, may be proved by the person presenting it. *Ferguson v. Davis County*, 601.
4. **COUNTY BRIDGES: INSPECTION OF: NEGLIGENCE.** The failure of the board of supervisors to inspect county bridges, or to appoint some competent person to do so, as frequently as men of ordinary prudence would deem necessary, was negligence that would render the county liable for any injury caused by a defective bridge. *Id.*

See MANDAMUS, 1.

BOND.

1. **CONDITION OF: LIABILITY OF SURETY UNDER.** Where one member of a partnership pleaded certain claims due the partnership as a set-off in an action against him individually, and executed a bond, with surety, "to account for the whole proceeds of said claims," it was held that the bond bound the obligors to pay the entire amount of such claims, although a portion of them might have been paid to the principal before the bond

was executed; and that the dismissal of an action to settle the partnership would not release the surety. *Jones v. Fields et al.*, 317.

2. **BREACH OF: DAMAGES: TENDER.** Where a bond was conditioned for the delivery of a certain land warrant on or before a certain date, if the obligor violated the conditions of the bond, and became liable thereon for damages, he could not, after such liability attached, defeat it by a tender or delivery of the warrant into court. *Bolster v. Post*, 698.
3. **CONSTRUCTION OF: PENALTY:** Under the conditions of a certain bond, set out in the opinion, for the delivery of a certain land warrant, it was held that the amount which the defendant obligated himself to pay must be regarded as a penalty, and not as liquidated damages, and that plaintiff was not entitled to recover more than the value of the warrant. *Id.*
4. **ACTION ON: CONSIDERATION: NON-JOINDER OF PARTIES.** In an action upon a bond given to secure the payment for certain lands, alleged to have been purchased by another, it was held that the evidence led strongly to the conclusion that the contract of purchase had never been completed; that if there was no mutually binding contract of purchase the bond would be without consideration; and that as other parties may have an interest in the determination of the question as to the validity of the contract, who have not been made parties to the record, no judgment could properly be entered in the case. *Decatur County v. Bright et al.*, 724.

See GUARDIAN, 1.

SURETY, 1.

BURDEN OF PROOF.

1. **CONTRACT: PLEADINGS.** The plaintiff claimed a certain sum as still due under a contract of sale, set out in the petition. The defendant denied all indebtedness on account of the contract declared on, and set forth substantially the same contract, alleging payment in full. *Held*, that the burden of proof was upon the plaintiff to establish the fact of indebtedness. *Garretson v. Butzer*, 469.

See CRIMINAL LAW, 11, 13.

HOMESTEAD, 4.

CASES IN IOWA REPORTS CITED AND FOLLOWED.

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| <p>Adams County v. The B. & M. R. R. Co., 44, 335. Practice. <i>Austin v. Wilson et al.</i>, 587.</p> <p>Allen v. McCalla, 35, 464. Attachment. <i>Riz & Stafford v. Silknitter</i>, 255.</p> <p>Armstrong v. Tama County, 34, 314. Waiver. <i>Bradley & Sherman v. Delaware County</i>, 553.</p> <p>Baldwin v. Dougherty, 39, 50. Administration. <i>Hadley v. Gregory et al.</i>, 159.</p> <p>Barlow v. The C., R. I. & P. R. Co., 29, 276. Railroads. <i>Stocumb v. The C., B. & Q. R. Co.</i>, 679.</p> <p>Barnes v. Greene, 30, 114. Tender. <i>Young v. McWald</i>, 102.</p> <p>Barrett v. Blackmar, 47, 565. Mortgage. <i>County of Floyd v. Cheney</i>, 163.</p> <p>Barr v. The City of Okaloosa, 45, 275. Railroads. <i>Drady v. The U. M. & Ft. D. R. Co.</i>, 403.</p> <p>Barthell v. Roderick, 34, 517. Verdict. <i>McFaul v. Woodbury County</i>, 100.</p> | <p>Barthol v. Blakin et al., 34, 452. Parcel assignment. <i>Hous & Co. v. Jones et al.</i>, 141.</p> <p>B., C. R. & M. R. R. Co. v. Stewart, 39, 267. Estoppel. <i>Stocumb v. The B., C. R. & N. R. Co.</i>, 682.</p> <p>Bisson v. Curry, 35, 72. Receiver. <i>Hous & Co. v. Jones et al.</i>, 142.</p> <p>Blair Town Lot Co. v. Scott, 44, 143. Taxation. <i>Roberts v. Deeds et al.</i>, 324.</p> <p>Blake v. Graves, 18, 312. Evidence. <i>Sweet v. Wright & Spencer et al.</i>, 512.</p> <p>Burden v. Sheridan, 35, 125. Statute of frauds. <i>McClain v. McClain</i>, 170.</p> <p>Bosworth et al. v. Farenholz, 3, 84. Tax deed. <i>Roberts v. Deeds et al.</i>, 324.</p> <p>Boyer v. Riley, 41, 13. Instructions. <i>Furman v. The C., R. I. & P. R. Co.</i>, 44.</p> <p>Bradford v. Bodfish, 39, 681. Step-children. <i>Otto et al. v. Schlappkahl et al.</i>, 329.</p> <p>Brandriff v. Harrison County, 50, 164. Taxation. <i>Lewis et al. v. Eshleman et al.</i>, 635.</p> |
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- Brewster et al. v. Dryden & Berry, 53, 657. Jurisdiction. *Wetmore v. McMillan et al.*, 348.
- Brown v. Allen, 35, 306. Mortgage. *Muir v. Blake et al.*, 664.
- Brown v. Bridges, 31, 138. Adverse possession. *Tracy v. Newton et al.*, 213.
- Burdick v. Kent, 53, 583. Homestead. *Bradshaw v. Hurst et al.*, 748.
- Burroughs v. McLain, Adm'r, 37, 189. Administration. *Hadley v. Gregory et al.*, 159.
- Burton v. Hintrager, 18, 348. Redemption by minor. *Witt, Guardian, v. Mewhirter*, 550.
- Butler v. Board of Supervisors, 46, 326. Estoppel. *Truesdell v. Green et al.*, 220.
- Butler v. Delano, 42, 350. Tax sale. *Truesdell v. Green et al.*, 217.
- Butler v. St. Louis Life Insurance Co., 45, 97. Expert testimony. *Smith v. Hickenbottom*, 736.
- Butterfield v. Walsh, 21, 97. Bona fide purchaser. *Merritt et al. v. Grover*, 496.
- Butterfield v. Wicks, 44, 313. Homestead. *Cunningham v. Gamble*, 47. *Blair et al. v. Wilson*, 179.
- Byers v. Bailey, 7, 390. Mandamus. *Collins v. Davis et al.*, 258.
- Cain v. Cain, 23, 31. Dower. *Potter et al. v. Worley et al.*, 68.
- Cadle v. The Muscatine Western R. Co., 44, 13. Railroads. *Drady v. The D. M. & Ft. D. R. Co.*, 403.
- Carmichael v. Vandebur, 51, 225. Practice. *Tiffany v. Henderson*, 490.
- Caso & Co. v. Burrows, 54, 679. Assignment of lease. *Lufkin & Wilson v. Preston*, 29.
- Cassady, Adm'r, v. Spofford, 57, 237. Practice in the Supreme Court. *Conwell v. House et al.*, 755.
- Cassidy v. Caton, 47, 22. Pleading. *University of Des Moines v. Livingston*, 312.
- City of Centerville v. Miller, 57, 56. Cities, powers of. *The City of Centerville v. Miller*, 226.
- City of Chariton v. Barber, 54, 360. Municipal corporations. *The City of Centerville v. Miller*, 57.
- City of Clinton v. The Clinton & Lyons R. Co., 37, 61. Railroads. *Drady v. The D. M. & Ft. D. R. Co.*, 403.
- City of Davenport v. Stevenson, 34, 225. Damages. *Drady v. The D. M. & Ft. D. R. Co.*, 403.
- City of Mt. Pleasant v. Breeze, 11, 399. Municipal corporations. *The City of Centerville v. Miller*, 57.
- Clark v. The City of Des Moines, 19, 219. Waiver. *Brady & Sherman v. Delaware County*, 553.
- Collins v. Lucas County, 50, 448. Board of supervisors. *Brady & Sherman v. Delaware County*, 553.
- Collins v. Ripley County Judge, 8, 129. Injunction. *Collins v. Davis et al.*, 258.
- Conger v. Cook et al., 56, 117. Administration. *Hadley v. Gregory et al.*, 158.
- Cornell College v. Iowa County, 32, 520. Equity. *Collins v. Davis et al.*, 259.
- Corriell v. Ham, 2, 252. Dower. *Potter et al. v. Worley et al.*, 68.
- Cowins v. Tool, 36, 82. Settlement of estates. *Kouss v. Mowery*, 21.
- Crawford v. Taylor et al., 42, 260. Redemption; limitation. *County of Floyd v. Cheney*, 164.
- C., R. I. & P. R. Co. v. Grinnell, 51, 482. Railroads. *The C. I. R. Co. v. The M. & A. R. Co.*, 255.
- C., R. I. & P. R. Co. v. Hurst, 30, 73. Appeal. *Lance v. The C. I. & St. P. R. Co.*, 637.
- Cummings v. Easton, 46, 183. Taxes. *Jiska v. Ringgold County et al.*, 633.
- C. & S. W. R. Co. v. Swinney, 38, 182. Homestead. *Cunningham v. Gamble*, 49.
- Daniels v. The C. & N. W. R. Co., 35, 135. Damages; eminent domain. *Drady v. The D. M. & Ft. D. R. Co.*, 408.
- Davis v. Huebner, 45, 574. Adverse possession. *Slocumb v. The C., B. & Q. R. Co.*, 679.
- Davis v. The B., & M. R. R. Co., 25, 550. Railroads; fencing. *Mundhenk v. The C. I. R. Co.*, 720.
- Davis v. The C. & N. W. R. Co., 46, 389. Railroads. *Drady v. D. M. & Ft. D. R. Co.*, 403.
- Davis v. Payne & Shaddock, 45, 194. Pleading. *Shaw v. Kendig*, 392.
- Dickey v. Brown et al., 56, 426. Agent, notice to. *Thomas v. Desney*, 60.
- District Township of Taylor v. Moore, 39, 605. Certiorari. *Collins v. Davis et al.*, 260.
- Donald v. The St. L., K. O. & N. R. Co., 52, 411. Railroads. *Rush et al. v. The B., C. R. & N. R. Co.*, 202. *Drady v. The D. M. & Ft. D. R. Co.*, 409.
- Downard v. Crenshaw, 49, 296. Execution sale. *Merritt et al. v. Grover*, 496.
- Drumb v. Keene, 47, 435. Habeas corpus. *Kline et al. v. Kline et al.*, 387.
- Duman v. The City of Fort Madison. Parties. *Lewis et al. v. Eshleman et al.*, 635.
- Early v. Whittingham, 43, 163. Taxes and tax sale. *Roberts v. Deeds et al.*, 326.
- Ellis v. Peck, 45, 112. Bona fide purchaser. *Truesdell v. Green et al.*, 218.
- Engleken v. Webber, 47, 558. Intoxicating liquors, sale of. *Richmond v. Shickler et al.*, 488.
- Ennis v. Shiley, 47, 552. Intoxication; damages. *Richmond v. Shickler*, 498.
- Everett v. Beebe, 37, 452. Tax deed. *Roberts v. Deeds et al.*, 325.
- Exline v. Lowery, 46, 556. Counter-claim. *Miller v. The City of Centerville*, 642.
- Fejavary v. Broe-ch, 52, 88. Mortgage on crops. *Pennington v. Jones*, 38. *Muir v. Blake et al.*, 664.
- Ferguson v. Davis County, 51, 220. Venue; waiver. *Bennett v. Carey*, 224; *Ferguson v. Davis County*, 605.
- Fiffel v. Gaston, 12, 218. Voluntary conveyance. *Darbydt & Co. v. Perry et al.*, 419.
- First National Bank of Davenport v. Baker et al., 57, 194. Homestead. *Bradshaw v. Hurst et al.*, 747.
- Floyd v. Mosier, 1, 513. Homestead. *Cunningham v. Gamble*, 48.
- Foster v. The County of Clinton, 51, 541. County, claims against. *Turner & Co. v. Woodbury County*, 442.
- French v. Gifford, 30, 142. Receiver. *Hows & Co. v. Jones et al.*, 142.
- Gainer v. Gainer, 25, 337. Fraud. *Hamilton et al. v. Smith et al.*, 18.
- Garner v. Cutting, 32, 552. Landlord's lien. *Clark v. Haynes*, 98. *Thorpe Bros. & Co. v. Fowler et al.*, 544.
- Gebhard v. Sattler, 40, 152. Statute of limitations. *Otto et al. v. Schlappkahl et al.*, 230.
- Gerdes v. Weiser, 54, 591. Minors. *Otto et al. v. Schlappkahl et al.*, 229.
- Gokey v. Kuapp, 44, 32. Principal and agent. *Hopkins v. The Hawkeye Ins. Co.*, 208.
- Gower v. Winchester, 33, 303. Statute of limitations. *The County of Floyd v. Cheney*, 163.

- Grant v. The City of Davenport, 36, 406. Municipal corporations. *Dodge et al. v. The City of Council Bluffs et al.*, 668.
- Grey v. McCallister, 50, 497. Assignment. *Clews v. Traer et al.*, 466.
- Greenleaf v. The D. & S. C. R. Co., 33, 59. Negligence. *Tuffree v. The Incorporated Town of State Center*, 540.
- Grimes v. The Simpson Centenary College, 42, 391. Contract. *Hyler v. Wellington*, 415.
- Grimmell v. Warner, 21, 12. Presumption of payment. *Wilcox v. Jackson*, 284.
- Grube v. Wells, 21, 148. Adverse possession. *Tracy v. Newton et al.*, 212.
- Hallitt v. The C. & N. W. R. Co., 22, 259. Double damages. *Mundhenk v. The C. I. R. Co.*, 723.
- Hamilton v. The D. M. V. R. Co., 36, 31. Evidence. *Allen v. The B., C. & N. R. Co.*, 628.
- Hamilton v. Wright, 30, 490. Adverse possession. *Tracy v. Newton et al.*, 212.
- Harkness v. Burton, 39, 101. Homestead. *Cannabham v. Gamble*, 49.
- Harris v. Beam, 46, 118. Practice. *Mullen v. Peck*, 431.
- Harvey v. Spaulding, 16, 398. Redemption. *Thayer v. Children et al.*, 114.
- Hecht v. Springstead, 51, 502. Jurisdiction. *Wetmore v. McMillan et al.*, 347.
- Henderon v. Legg, 16, 486. Equity. *Searcy v. Moyer*, 618.
- Hendrickson v. Kingsbury, 21, 387. Exemplary damages. *Parkhurst v. Masteller*, 480.
- Henry v. The D. & P. R. Co., 2, 288. Damages. *Lance v. The C., M. & St. I. R. Co.*, 603.
- Hiatt v. Kirkpatrick, 48, 78. Statute of limitations. *Tracy v. Newton et al.*, 213.
- Hibbs v. The C. & S. W. R. Co. et al., 39, 340. Trespass. *Loch et al. v. The B., C. & N. R. Co.*, 202.
- Hinkle v. Davenport, 38, 355. Amendment. *Lafany v. Henderson*, 492.
- Hitchner v. Ehlers, 44, 40. Intoxication; damages. *Richmond v. Shickler et al.*, 488.
- Holbert v. The St. L., K. C. & N. R. Co., 45, 26. Eminent domain. *Dodge et al. v. The City of Council Bluffs et al.*, 664.
- Holiday v. Holiday, 10, 200. Fraudulent conveyance. *Weir v. Day*, 86.
- Hook v. Mowre, 17, 195. Voluntary conveyance. *Barthold & Co. v. Perry et al.*, 418.
- Hewe Machine Co. v. Stiles, 53, 424. Lost instrument. *Hansen v. The American Insurance Co.*, 742.
- Hubbard v. Smutzer, 47, 681. Negligence. *Haverly v. McDonald v. McClelland*, 183.
- Hill & Argalls v. The County of Marshall, 12, 154. Waiver. *Bradley & Sherman v. Delaware County*, 533.
- Huston v. Markley, 49, 162. Tax sale. *Truedell v. Green et al.*, 218.
- Huston v. Seely, 27, 183. Notice. *Thomas v. Deancy*, 62.
- Ingram et al. v. The C., D. & M. R. Co., 38, 669. Railroads. *Prudy v. The D. M. & Ft. D. H. Co.*, 403.
- Immebart v. Gorgas et al., 41, 439. Description in deeds. *Roberts v. Deeds et al.*, 324.
- Jaquith v. Royce, 42, 406. Criminal law. *The State v. Vail*, 104.
- Jennings v. Jennings, 56, 288. Practice. *Kline et al. v. Kline et al.*, 387.
- Jewett v. Wanshura, 43, 574. Intoxicating liquors. *Menner v. Kirt et al.*, 421.
- Johnson v. Dodge, 19, 106. Judgment in rem. *Taylor & Farley Organ Co. v. Plumb et al.*, 36.
- Jones v. Clark, 37, 586. Replevin; demand. *Oswego Starch Factory v. Lendrum*, 576.
- Jones v. Hockman, 12, 101. Adverse possession. *Tracy v. Newton*, 212.
- Jordan v. Hayne, 36, 9. Municipal corporations. *Collins v. Davis et al.*, 260.
- Judd v. Anderson, 51, 345. Tax deed. *Roberts v. Deeds et al.*, 324.
- Kearney v. Fitzgerald, 43, 580. Intoxicating liquors, sale of. *Richmond v. Shickler*, 488.
- Koester v. The City of Ottumwa, 34, 41. Misconduct of juror. *Stafford v. The City of Oskaloosa*, 753.
- Koene v. The C. & N. W. R. Co., 23, 498. Statute penalty. *Herriman v. The B., C. & N. R. Co.*, 189.
- Kyne v. Kyne, 48, 24. Will; dower. *Potter et al. v. Worley et al.*, 67.
- La France v. Krayner, 42, 143. Joint wrongdoer. *Richmond v. Shickler et al.*, 488.
- Lamb v. Anderson, 54, 190. Railroads. *Hickbottom v. The C., B. & Q. R. Co.*, 704.
- Lash v. Lash, 57, 88. Descent. *Leonard v. Lining*, 630.
- Lawrence v. Smith, 50, 703. Promissory note. *Lawrence v. Smith*, 702.
- Leavitt v. Watson, 37, 93. Innocent purchaser. *Truesdell v. Green et al.*, 219.
- Leighton v. Orr, 44, 679. Will. *Kelsey v. Kelsey et al.*, 384.
- Linscott v. Lamart, 46, 312. Execution sale. *Martin v. Knapp et al.*, 340.
- Lloyd v. Bunce, 41, 660. Redemption; minors. *Will, Guardian, v. Meuchter*, 550.
- Loomis v. McKenzie, 48, 416. New trial.
- Loomis v. McKenzie, 49. Bill of exceptions. *Tiffany v. Henderson*, 490.
- Lowry v. Polk County, 51, 60. Public funds. *Long v. Emsley et al.*, 13.
- Lufkin & Wilson v. Preston, 52, 235. Replevin. *Lufkin & Wilson v. Preston*, 28.
- Lyman v. Cessford, 15, 229. Voluntary conveyance. *Barthold & Co. v. Perry et al.*, 418.
- Mackie v. The C. I. R. Co., 54, 540. Double damages. *Mundhenk v. The C. I. R. Co.*, 722.
- Mally v. Mally, 52, 654. Res adjudicata. *Mull v. Willett*, 708.
- Mann v. Howe, 2, 546. Reading. *McIntosh v. Lee*, 359.
- Manny & Co. v. Adams, 32, 165. Attachment. *Lufkin & Wilson v. Preston*, 29; *Howe & Co. v. Jones et al.*, 135.
- Marratt v. Deihl, 37, 250. Notice. *Slocumb v. The C., B. & Q. R. Co.*, 679.
- Martin v. Ragsdale, 49, 589. Tax sale. *Truesdell v. Green et al.*, 218.
- Martin v. Stearns, 52, 345. Landlord's lien. *Thorpe Bros. & Co. v. Fowler et al.*, 544.
- McCormack v. Molburg, 43, 561. Promissory note. *Hopkins v. The Hawkeye Insurance Co.*, 437.
- McCrory v. Tasker et al., 41, 255. Administration. *Hadley v. Gregory et al.*, 158.
- McGlothlen v. Hite, 55, 392. Homestead, liens on. *Conger v. Cook*, 51. Mortgage. *Wells et al. v. Wells et al.*, 412.
- McGregor & Sioux City R. Co. v. Foley, 38, 584. Practice. *Aldrich v. Price & Co.*, 155.
- McGuire v. Brown, 41, 650. Dower; will. *Potter et al. v. Worley et al.*, 68.
- McKean v. The B., C. B. & N. R. Co., 55, 192. Evidence. *Allen v. The B., C. & N. R. Co.*, 628.
- McKinley v. The C. & N. W. R. Co., 44, 312. Mental suffering. *Parkhurst v. Masteller*, 480. Compensatory damages. *Ferguson v. Davis County*, 609.

- Merritt v. Fisher, 19, 364. Landlord's lien. *Clark v. Haynes*, 98.
- Metteer v. Wiley, 34, 214. Will; dower. *Potter et al. v. Worley et al.*, 67; *Blair et al. v. Wilson*, 178.
- Meyers v. Weighman, 45, 579. Statute of Limitations. *Tracy v. Newton et al.*, 213.
- Millburn v. The City of Cedar Rapids, 12, 246. Railroads. *Drady v. The D. M. & Ft. D. R. Co.*, 403.
- Miller v. Dayton, 57, 428. Accessory. *The State v. Lucas*, 505.
- Miller v. The Mutual Benefit Life Insurance Co., 31, 216. Insurance. *Watkins v. The Germania Fire Insurance Co.*, 531.
- Moore v. Lowrey, 25, 336. Statute of frauds. *Hove & Co. v. Jones et al.*, 140.
- Moore v. Weaver, 63, 11. Inheritance. *Lash v. Lash et al.*, 61; *Leonard v. Lining*, 650.
- Morrison et al. v. Hershire, 32, 271. Equity. *Grimmett v. The City of L. & M. v. Moines*, 144.
- Muldoney v. The Illinois Central R. Co., 36, 462. Damages. *Ferguson v. Davis Co.*, 609.
- Murphy v. The S. C. & P. R. Co., 55, 473. Verdict. *Lewis v. The C., M. & St. P. R. Co.*, 130.
- Neesse v. The Farmer's Insurance Co., 55, 604. Estate. *Hadley v. Gregory et al.*, 153.
- Noll v. The D. B. & M. R. Co., 32, 66. Constitutional law. *The U. S. v. The M. & A. R. Co.*, 253.
- Overholt et al. v. Lanay et al., 54, 748. Practice in the Supreme Court. *Conwell v. House et al.*, 565.
- Parkhurst v. Masteller, 57, 474. Malicious prosecution. *Bruley v. Rose et al.*, 653.
- Partridge & Co. v. Harrow et al., 27, 96. Verdict. *McFaul v. Woodbury County*, 100.
- Patterson v. Baumer, 43, 477. Estoppel. *Truesdell v. Green et al.*, 220; *Noyes et al. v. Harrison County et al.*, 313; *Stocumb v. The U. B. & Q. R. Co.*, 682.
- Patterson v. Bell, 25, 149. Settlement of estate. *Kouts v. Lowrey*, 21.
- Pearson v. Robinson, 44, 413. Minor; redemption. *Witt, Guardian, v. Mewhirter*, 548.
- Pennington v. Jones, 57, 37. Mortgage; description. *Muir v. Blake et al.*, 686.
- Perkins v. Jones & League, 55, 211. Venue. *Bennett v. Carey*, 223.
- Peterson v. Ochs et al., 40, 530. Instructions. *Furman v. The C., R. I. & P. R. Co.*, 44.
- Portman v. Klemish, 54, 198. Estate. *Crispin v. Winkelman*, 526.
- Potter v. Worley, 57, 66. Dower. *Blair et al. v. Wilson*, 178.
- Powers v. The City of Council Bluffs, 45, 652. Statute of limitations. *Baldwin v. The Oskaloosa Gas Light Co.*, 54.
- Pratt v. The Western Edge Co., 26, 241. Appeal. *Loomis v. McKenzie*, 81.
- Prescott v. Gonser, 34, 175. Statute of limitations. *Devey v. Lins et al.*, 237.
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- Scharfenburg v. Bishop, 35, 60. Mortgage. *Pennington v. Jones*, 38; *Muir v. Blake et al.*, 683.
- Seiben v. Becker et al., 53, 24. Execution sale. *Thayer v. Coldren et al.*, 114.
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- Simpson Centenary College v. Bryan, 50, 293. Consideration. *University of Des Moines v. Livingston*, 311.
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- State v. Red, 53, 69. Alibi. *The State v. Hamilton*, 698.
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- State v. Schlagal, 19, 169. Accomplice. *The State v. Allen*, 436.
- State v. Shaw, 28, 67. Notice. *Thomas v. Desney*, 62.
- State v. Sterling, 34, 443. Conspiracy. *Müller v. Dayton*, 428.
- State v. Taylor, 25, 273. Recent possession. *The State v. Kelly*, 646.
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- Stephens v. Harrow, 26, 458. Fraudulent conveyance. *Weir v. Day*, 86.
- Stephens v. Pence, 56, 257. Mortgage. *Muir v. Blake et al.*, 664.
- Stephens v. Williams, 46, 540. Evidence. *Hadley v. Gregory et al.*, 156; *Sweet v. Wright & Spencer et al.*, 512.
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- Thompson v. Ware, 43, 465. Tax sale. *Truedell v. Green et al.*, 217.
- Trowbridge v. Sypher, 55, 352. Liens; homestead. *Conger v. Cook*, 51; *Wells et al. v. Wells et al.*, 412.
- Turner v. Hitchcock, 20, 310. Joint tort-feasor. *Long v. Long*, 500.
- Tuttle v. Story County, 55, 516. Trial de novo. *Hart v. Jackson*, 76.
- Two good v. Franklin, 27, 239. Execution sale. *Merritt et al. v. Grover*, 496.
- Van Felt v. The City of Davenport, 42, 308. Negligence. *Roehl v. The City of Muscatine*, 456; *Ferguson v. Davis County*, 608.
- Van Riperv. Baker, 44, 450. Statute of frauds. *Jes v. Downs*, 690.
- Van Shalck v. Hobbins, 36, 201. Bona fide purchaser. *Truedell v. Green et al.*, 218.
- Vaughn v. Stone, 53, 213. Tax deed. *Roberts v. Deale et al.*, 324.
- Verry v. The B., C. B. & M. R. Co., 47, 549. Agent; evidence. *Mundhenk v. C. I. R. Co.*, 721.
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- Watson v. Van Meter, 43, 76. Practice in the Supreme Court. *McIntosh v. Lee*, 369.
- Webster County v. Taylor, 19, 117. Valuer. *Bradley & Sherman v. Delaware County*, 553.
- Weire v. The City of Davenport, 11, 49. Assignment. *Clews v. Traer et al.*, 466.
- Whitescarver v. Bonney, 9, 480. Conveyance. *Barhydt & Co. v. Perry et al.*, 419.
- White v. Polk County, 17, 413. Claim against county. *Ferguson v. Davis County*, 608.
- White v. Rowley, 46, 680. Execution sale. *Martin v. Knapp et al.*, 340.
- Wilson v. Hardesty, 48, 515. Homestead. *Conger v. Cook*, 51; *Wells et al. v. Wells et al.*, 412.
- Woodman v. Dutton, 49, 396. Evidence. *Woodman v. Dutton*, 443.
- Woolheather v. Risley, 38, 486. Intoxicating liquors. *Richmond v. Shickler et al.*, 487.
- Wyllis v. Ault, 46, 48. Principal and agent. *Thomas v. Desney*, 60.
- Yant v. Harvey, 55, 421. Mortgage; description. *Muir v. Blake et al.*, 665.

CERTIORARI.

1. RETURN. The return to the writ of *certiorari* in this case was sufficient to authorize the examination of the case upon its merits. *The State v. Baldwin*, 266.

See MUNICIPAL CORPORATIONS, 9.

CLERK.

1. NEGLIGENCE: APPROVAL OF BOND. Under the facts in this case, it was held that the court could not say, as a matter of law, the clerk was not negligent in approving the stay bond. *Haverly & McDonald v. McClelland*, 182.
2. —: —. Where the clerk is negligent in approving a bond, he

cannot afterward demand the aid of the plaintiff in gaining information as to the responsibility of the surety. *Id.*

See TOWNSHIP CLERK.

CONSIDERATION.

See BOND, 4.

CONTRACT, 4.

PROMISSORY NOTE, 32.

SUBSCRIPTION, 1, 2.

CONSTITUTIONAL LAW.

1. RULE APPLIED. Where a part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void, if the provisions are distinct and separable. Even if the defendant in this case could not be denied the right to construct the switch in question, yet it can be done only upon making compensation therefor. *Drady v. The D. M. & Ft. D. R. Co.*, 393.

See EVIDENCE, 16.

RAILROADS, 9, 21.

CONTRACT.

- 1 CHANGE OF: SPECIAL FINDINGS. In this case it was held, that the special findings of the jury showed that the written contract was substantially abandoned; that a new oral contract was entered into by the parties; and that the general verdict must have been based on such oral contract. *Aldrich v. Price & Co.*, 151.
2. PAROL TESTIMONY TO VARY: AMENDMENT. A written contract for the transfer of an interest in a promissory note considered and construed to constitute the transferee the absolute owner of the note, except so far as his ownership was qualified by the contract itself, and that an amendment to the petition, the object of which was to let in parol testimony to show a different intent, was properly rejected. *Hylar v. Wellington*, 413.
3. CONSTRUCTION OF: BREACH OF. A contract, set out in full, construed and held not to convey a vested interest in the premises therein described; and that the foreclosure of the mortgage therein referred to could not be an adjudication of the rights of the grantee under the contract, nor preclude her from bringing an action for a breach of the contract. *Malli v. Willett*, 705.
4. CONSIDERATION: COMPROMISE OF FELONY. A contract will not be declared void and the cause be reversed, on the ground that the only consideration therefor was the compromise of a felony, where it does not clearly appear from the evidence whether the consideration for the contract was a forbearance to prosecute criminally, or in a civil action for damages. *Id.*
5. BREACH: PARTIES TO ACTION. Under the terms of the contract the ac-

tion for a breach thereof was properly brought in the name of the plaintiff alone, without joining her husband. *Id.*

See ATTORNEY, 1.

BOND, 4.

FRAUD, 2.

LIFE ESTATE, 1.

CONVEYANCE.

1. DURESS. Where the evidence shows the conveyance was an intelligent, voluntary act, the facts that the deed was executed reluctantly, and after some threats had been made, are insufficient to establish undue influence or duress. *Hamilton et al. v. Smith et al.*, 15.
2. ANTE NUPTIAL: FRAUD. A conveyance to children just prior to, and in contemplation of a second marriage, and without the knowledge of the wife, will not be construed as a fraud on the rights of the wife. *Id.*
3. CONSIDERATION: FAILURE OF: SETTING ASIDE. A conveyance made upon the consideration of support of parents will be set aside when the evidence shows an abandonment by all the parties of the contract of support. *Jewell v. Reddington*, 92.
4. ———: GOOD FAITH. Evidence considered and held to show a sufficient consideration, and that the conveyance was made in good faith. *Thayer v. Coldren et al.*, 110.
5. EQUITABLE TITLE: DEED: BREACH OF COVENANT. The mere fact of the existence of an equitable title in a third person cannot be set up in an action at law, as a breach of any of the usual covenants in a deed conveying the legal title. *Wilson v. Irish*, 184.
6. ———: ———: POSSESSION. Where the covenantee takes, or has power to take, possession under his deed, he cannot complain of an outstanding equitable title, until it is successfully asserted. *Id.*

See TRUST, 2.

CORPORATIONS.

1. FOREIGN: POWERS OF. The powers possessed by a foreign corporation, organized for the purpose of supplying water for municipal and other purposes, are not restricted to the State in which it is incorporated, but it may extend its operations and do business and acquire interests in other States, although not expressly authorized so to do by the laws of the State where incorporated. *Dodge et al. v. The City of Council Bluffs et al.*, 560.
2. ———: POWER OF STATE TO CONTROL. The fact that the State of Iowa has reserved control over its own corporations, and cannot control foreign corporations, will not prevent the transaction of all ordinary business in this State by foreign corporations, nor prohibit them from appropriating private property when necessary. *Id.*

See MUNICIPAL CORPORATIONS, 15.

COUNTY.

1. **BRIDGES: EXPERT TESTIMONY.** The evidence of an expert, a bridge-builder, as to the average length of time white oak timber would last in a bridge, was properly admitted. Such facts should not be left to be inferred by the jury without proof. *Ferguson v. Davis County*, 601.
2. ———: **ADOPTION OF PLAN: NEGLIGENCE.** A county cannot carelessly and negligently adopt an insufficient plan for a bridge, and escape liability for damages resulting from the insufficiency of the plan. The county should exercise reasonable care in the adoption of a plan for a public bridge. *Id.*
3. ———: **DEFECTIVE NOTICE: LIABILITY.** Where a county was not negligent in the construction of a bridge, it will not be liable for an injury resulting from the same becoming defective and out of repair, unless it had notice or knowledge thereof, or unless the defect was so notorious that not to know of it was negligence. *Id.*
4. ———: **FAILURE TO REPAIR.** Where the county had knowledge, or, in the exercise of reasonable prudence, had reason to know, that a bridge was defective, and failed to repair it, or to prevent the public from using it, it is liable for any injury resulting therefrom. *Id.*
5. **KNOWLEDGE OF DEFECT.** The facts that the bridge had been out of repair for seven or eight months, and was old, and that the county took no measure to examine or repair it, will not constitute negligence, unless some member of the board of supervisors knew, or had reason to know, that it was unsafe. *Id.*

See ASSIGNMENT, 4.

BOARD OF SUPERVISORS, 1, 2, 3, 4.

ELECTION, 1.

COURT.

See BANKRUPTCY, 1.

PLEADING, 1.

PRACTICE, 8, 17.

CRIMINAL LAW.

1. **DISCHARGE OF DEFENDANT: COSTS ON APPEAL.** A prosecution under a city ordinance, enacted by authority of the State law, the violation of which is punishable by fine and imprisonment, is a criminal proceeding, and an acquittal on appeal in the District Court is an end of the defendant's liability for costs. *The State v. Vail*, 103.
2. **RAPE: INSTRUCTIONS: REASONABLE DOUBT.** The instructions in a prosecution for rape omitted to refer to the provision of section 4429, Code, and to state fully that where there was a reasonable doubt as to the degree of guilt, the defendant could be convicted of the lower degree only: *Held*, erroneous and prejudicial. *The State v. Jay*, 164.
3. **POSSESSION OF STOLEN GOODS: PRESUMPTION OF LAW.** Where the instruction stated that the presumption arising from the recent possession of stolen goods, was one of law; but left to the jury the power to

say whether such a presumption warranted a verdict of guilty, the defendant was not prejudiced by calling the presumption one of law. *The State v. Richart*, 245.

4. **PREFONDERANCE OF EVIDENCE: REASONABLE DOUBT.** The defendant can only be required to introduce evidence which creates a reasonable doubt whether he honestly came into the possession of recently stolen property. An instruction that he must overcome the presumption arising from such possession by a preponderance of evidence was erroneous. *Id.*
5. **MISDEMEANOR: APPEARANCE BY COUNSEL.** An indictment for resisting an officer serving legal process charges a misdemeanor. In such case the defendant may appear by counsel and demand a trial, and it was error for the court to refuse a trial and order a forfeiture of the bond. *The State v. Conneham*, 351.
6. **CONSPIRACY: EVIDENCE.** The acts and declarations of a party alleged to be a co-conspirator, tending to establish the fact of a conspiracy, are admissible in evidence although no conspiracy was alleged; and it is for the jury to determine from the whole testimony whether a conspiracy has been shown, and if not, then such testimony should be disregarded. *Miller v. Dayton*, 423.
7. **ACCOMPLICE: CORROBORATION OF.** It is not necessary, in order to sustain a conviction, that an accomplice should be corroborated in every material fact to which he testifies; and where the jury found there was sufficient corroboration of the evidence of the accomplice this court will not interfere, provided there were facts in evidence from which the jury might fairly have so found. *The State v. Allen*, 431.
8. **SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.** Evidence considered and held sufficient to justify the jury in finding that the defendant was present and accessory to the robbery. *The State v. Lucas*, 501.
9. **CONSPIRACY: ACCESSORY.** It is not necessary that the evidence of an unlawful combination to commit a crime should be direct and positive. The defendant's connection with the transaction being shown, it is for the jury to determine from all the circumstances, whether he was there as an honest dupe or as a criminal accessory. *Id.*
10. **SENTENCE NOT EXCESSIVE.** In view of the aggravated circumstances of this case, the sentence, imposing but little more than half the maximum punishment allowed by law, was not excessive. *Id.*
11. **ALIBI: BURDEN OF PROOF.** Where the defendant in a criminal trial relies upon the defense of an *alibi*, the burden of proof is upon him to establish such defense by a preponderance of the evidence. Following *The State v. Hamilton*, *post*, 596. *The State v. Krensen*, 588.
12. **DEGREE OF PROOF: JURY: REASONABLE DOUBT.** While a juror who entertains a reasonable doubt of the defendant's guilt is not required to surrender his convictions, because the other jurors have no such doubt, yet the refusal to so instruct, where the court gave the usual instructions in regard to the degree of proof required, was not error. *The State v. Hamilton*, 596.
13. **ALIBI: BURDEN OF PROOF.** It is now the settled law of this State that where, in a criminal case, the defense of an *alibi* is relied upon, the burden of proof is on the defendant to establish such defense by a preponderance of the evidence. *Id.*
14. — — — — —: **ADAMS, J., dissenting, held**, that if the evidence introduced to establish an *alibi* was such as to raise a reasonable doubt of the

defendant's guilt, the jury would be justified in acquitting. *DAY, J., concurring. Id.*

15. **POSSESSION OF STOLEN PROPERTY: PRESUMPTION.** The recent possession of stolen property will authorize a conviction, unless the presumption of guilt arising therefrom is overcome by other facts; and it is immaterial whether it be termed a presumption of law, or a presumption of fact, as both are identical in meaning. *The State v. Kelly, 644.*
16. **RAPE: ASSAULT WITH INTENT: EVIDENCE: COMPETENCY OF.** Where the defendant was charged with having unlawfully carnal knowledge of one O., a female, by administering to her a drug producing stupor, and was convicted of an assault with such intent, it was immaterial, under the verdict, whether the prosecutrix knew the bad reputation of the defendant in respect to women prior to the alleged offense, and testimony of such knowledge was properly excluded. *The State v. Porter, 691.*
17. ———: **DEGREES OF CRIME: INSTRUCTION.** Under the evidence in this case the jury should have been allowed, if they saw fit, to find the defendant guilty of an assault and battery or a simple assault; and an instruction that they must find the defendant guilty as charged, or guilty of an assault with intent, etc., or not guilty, was erroneous. *Id.*
18. **CONSPIRACY: THREATS BY ONE JOINTLY INDICTED.** Where two persons were jointly indicted for murder, and there was no evidence tending to show a conspiracy between the two, or any accord or concert in feeling and action against the deceased, prior to the conflict resulting in his death, upon the separate trial of one, testimony of threats made by the other four or five months before the homicide, was incompetent. *The State v. Weaver, 730.*
19. **CO-CONSPIRATOR: DECLARATIONS OF: INCOMPETENT.** One conspirator is bound by the declarations and acts of his confederate, but the declarations of a co-conspirator, made after the purposes of the conspiracy have been accomplished, are incompetent to establish the guilt of the accused. *Id.*
20. **STATEMENTS: FAILURE TO DENY.** Where one is under arrest, charged with a crime, his mere silence and failure to deny statements made in his presence tending to criminate him, cannot be interpreted as an admission of the truth of such statements. *Id.*

See EVIDENCE, 7, 19, 24.

PLEDGE, 1.

CROPS.

See EXECUTION SALE, 4.

MORTGAGE, 1, 6, 7, 9.

RAILROADS, 17.

TENANT AT WILL, 2.

DAMAGES.

1. **PROOF OF: PRACTICE.** The amount of damages must be proved or the party is entitled to nominal damages only; and a judgment will not be reversed for a failure to assess mere nominal damages. *McIntosh v. Lee, 356.*

2. **COMPENSATION: TRESPASS.** The compensation provided by section 464, Code, as amended, cannot be limited to damages for change of grade, but it includes all legitimate damages, and where the occupation of the street was unlawful, a party, if injured thereby, may maintain an action for the trespass before the permanent damages are assessed. *Drady v. The D. M. & Ft. D. R. Co.*, 393.
3. **DIVERSION OF WATER-COURSE: LIABILITY OF CITY.** The pleadings, the proofs and the instructions in this case, are substantially the same as in *Hoehl v. The City of Muscatine*, ante, p. 441. Following the decision in that case, the judgment of the court below must be reversed. *Fulleam v. The City of Muscatine*, 457.
4. **MENTAL SUFFERING.** In an action for malicious prosecution, mental suffering, not arising directly from bodily suffering, and injury to the feelings, constitute elements of actual or compensatory damages. *Parkhurst v. Masteller*, 474.
5. —: **EXEMPLARY DAMAGES.** In addition to damages for injury to the feelings, exemplary damages may be allowed in a proper case, strictly by way of punishment. *Id.*
6. **PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE.** Plaintiff, while riding in a buggy in one direction and looking and talking to a person in the other direction, drove into a child's swing suspended between the sidewalk and the traveled portion of the street, and was thrown out and injured. *Held*, that such person was guilty of contributory negligence and could not recover for the injury. *Tuffree v. The Incorporated Town of State Center*, 538.
7. **COMPENSATORY: MENTAL SUFFERING.** In an action for personal injuries mental suffering, arising from actual physical injury inflicted, may properly be considered in estimating compensatory damages. *Ferguson v. Davis County*, 601.
8. **PERSONAL INJURIES: INSTRUCTION.** Where, in an action for personal injuries, the court instructed the jury that their verdict might be for a sum much larger than the amount actually claimed, the instruction was erroneous, and to authorize this court to disregard the error, it should clearly appear that no prejudice resulted therefrom. *Stafford v. The City of Oskaloosa*, 748.
9. **MEDICAL TREATMENT: EXPENSE FOR: PROOF OF:** Where there was no evidence tending to show the expenses incurred by plaintiff for medical care and treatment, an instruction authorizing the jury to allow damages for such expenses, was erroneous. *Id.*

See INTOXICATING LIQUORS, 1, 2, 3.

PUBLIC FUNDS, 3.

RAILROADS, 24.

TENANT IN COMMON, 1.

DEDICATION.

1. **IN PAIS: EVIDENCE OF.** Declarations, by a person in possession of land and holding an estate upon condition therein, of an intention to dedicate, coupled with subsequent acts of dedication when the land reverted to him, tend to establish the *animus dedicandi*, and are proper testimony. *Getchell et al. v. Benedict*, 121.

2. ———: RECORDS: TAXATION. Where land has been dedicated *in pais*, and continuously used as a highway, the facts that the county and city records all fail to show the existence of a highway, and that the land has been taxed, will not defeat the dedication or destroy the easement which the public holds therein. *Id.*

See HIGHWAY, 1.

STREET, 1.

DEED.

1. UNRECORDED: NOTICE OF. To constitute a valid notice of a prior unrecorded deed, it is not necessary that the party should be satisfied of the truthfulness of the matters contained in such notice. *Hamilton et al. v. Smith et al.*, 15.

See EXECUTION SALE, 4.

TAX SALE AND DEED, 3.

DESCENT.

1. INHERITANCE: WILL. Where a person died intestate without wife or issue, both parents being dead, it was held, under section 2457, Code, that his property never constituted any portion of his father's estate; that the person inheriting took directly from the intestate; and that the heirs of a deceased sister, cut off by the father's will, inherited, unaffected by the will. *Lash v. Lash et al.*, 88.
2. RIGHTS OF PARENTS. Where a child survived his father, but died without issue before the death of his grandfather, from whom the property was derived, it was held that he never had any vested estate in the property, and that his mother, surviving, would take nothing by descent. Parents succeed only to the estate which the child has at the time of his death. *Leonard v. Lining*, 648.

See HOMESTEAD, 7.

DIVORCE.

1. WILLFUL DESERTION. Where the evidence is sufficient to constitute willful desertion, and absence without reasonable cause for more than two years, a decree of divorce should be granted. *Pilgrim v. Pilgrim*, 370.
2. JURISDICTION: CUSTODY OF CHILDREN. A decree of divorce rendered in the State of Wisconsin on service by publication, so far as it attempted to fix the custody of the minor children, who were then residents of the State of Iowa, is without jurisdiction and void. *Kline et al. v. Kline et al.*, 386.
3. INJUNCTION: ATTACHMENT. In an action for divorce and alimony, the plaintiff, upon a proper showing, is entitled to an injunction restraining the defendant from disposing of his property to defeat the claim for alimony. The remedy by attachment given by statute, section 2227, Code, is cumulative only, not exclusive. *Wharton v. Wharton*, 696.

DOWER.

1. TAXES. Taxes paid by the administrator from the personal estate should not be made a charge upon the widow's distributive share. *Conger v. Cook*, 49.

2. **IN HOMESTEAD AND OTHER LANDS: LIENS.** Where the widow's dower was admeasured to include the homestead and other lands, the decree was construed to charge the homestead with one-third of the mortgage thereon alone, and her distributive share in other lands, with a *pro rata* liability as to the mortgage thereon, and approved. *Id.*
3. **BARRED: ACCEPTANCE OF WILL.** A widow's right of dower will not be barred by accepting the provisions of the will, when not inconsistent with her claims for dower. Following *Metteer v. Wiley*, 34 Iowa, 214. *Potter et al. v. Worley et al.*, 66.
4. **UNASSIGNED: HEIRS.** When the widow fails to have her dower interest set apart during her lifetime, her heirs may recover the same after her death. *Id.*
5. **HOMESTEAD: LIFE ESTATE: INTEREST OF HUSBAND.** Under the facts in this case, it was held that acceptance by the wife of a life estate in eighty acres, including the homestead, was not inconsistent with her right to dower; that possession of the homestead and all the land during her life did not evince an election to take the homestead in lieu of dower; and that upon her death her second husband became entitled to one-third of her dower interest in the lands of her former husband. *Blair et al. v. Wilson*, 177.
6. **WILL: ACCEPTANCE OF: ESTOPPEL.** Where the widow filed a written notice of her acceptance of the provisions of the will, but her consent was not entered of record, she would not be estopped thereby from claiming her distributive share in her husband's estate. *Baldazier v. Haynes et al.*, 683.

See HOMESTEAD, 1, 6.

WILL, 1.

ELECTION.

1. **ELECTION EXPENSES: LIABILITY FOR.** The necessary expenses incurred by the township trustees in providing and furnishing a place in which to hold the general State election is not a just claim against the county. *Turner & Co. v. Woodbury County*, 440.
2. **JUDGES OF: REFUSING VOTE: MISTAKE OF LAW.** In an action against the judges of election for refusing, at a general election, to receive and deposit plaintiff's vote, the defendants may plead and prove an honest mistake of law, in mitigation of damages. *Long v. Long*, 497.

EQUITABLE JURISDICTION.

1. **CIRCUIT COURT: JURISDICTION.** The Circuit Court, sitting as a court of chancery, has jurisdiction to adjudicate all matters in controversy between the guardian and his wards, whether arising after or before the wards become of age. *Latham et al. v. Myers*, 519.
2. **CONTINGENT INJURIES.** Courts of equity are not bound to prevent possible or contingent injuries, and the provision of an ordinance that if the special tax was inadequate to pay the water rentals the deficit should be paid from the general revenue, will not warrant interference. *Dodge et al. v. The City of Council Bluffs et al.*, 560.
3. **DEBT IN JUDGMENT: DISCHARGE IN BANKRUPTCY.** Where the debt is already in judgment, and the party needs only the removal of the apparent discharge of it arising from the bankruptcy proceedings, the relief is of equitable cognizance. *Knapp v. Hoyt et al.*, 591.

4. **LOST NOTE: ACTION TO RECOVER.** An action to recover the amount of a note, of which the defendant wrongfully and fraudulently obtained and still holds possession, is not cognizable in equity. *Searey v. Miller*, 613.
5. ———: ———. Other facts in this case considered and held not to be of such a nature as to render the case cognizable in equity. *Id.*

See MUNICIPAL CORPORATIONS, 4.

VERDICT, 1.

ESTATE.

1. **FILING CLAIMS: STATUTE OF LIMITATIONS.** Where a party informed his attorney of his claim against an estate, and supposed they had filed the same, but by mistake the claim was not filed until long afterwards, the case presents such equitable circumstances, excusing the failure to file the claim within one year after notice of taking out letters of administration, as to remove the bar of the statute of limitations. *Wilcox v. Jackson*, 278.
2. **INTERMEDDLER: PAYING CLAIMS.** One who intermeddles with the estate of a decedent, without having been appointed administrator, has no right to pay claims out of the assets of the estate; and in no case can he escape liability for so using the money of the estate, without an affirmative showing that the amounts paid were correct. *Crispin v. Winkelman*, 523.
3. ———: **CLAIMS AGAINST ESTATE.** An intermeddler's claim for nursing decedent and for the care of his child, should have been established as a claim against the estate. He had no right to reimburse himself therefor out of the proceeds of decedent's property in his hands *id.*
4. **ITEMS OF ACCOUNT: NOT ESTABLISHED.** An item of account for clothing furnished to the decedent's child prior to his death, not established nor shown to have been paid out of the decedent's money and by his direction, must be disallowed. *Id.*

ESTOPPEL.

1. **DIVERSION OF COURSE OF STREAM.** Where the plaintiff stood by and saw the defendant at great expense divert the course of a small stream, which previously had touched the corner of her premises, without objection, until the work of such diversion had been completed, she will not be entitled to a mandatory injunction restoring the stream to its original channel.

The rule: "He who is silent when he ought to speak will not be heard to speak when he ought to keep silent," applied. *Slacumb v. The C., B. & Q. R. Co.*, 675.

See HIGHWAY, 1.

MORTGAGE, 7.

EVIDENCE.

1. **IMMATERIAL: HEARSAY: NOT RESPONSIVE.** Certain evidence in this case considered; *held*, improperly admitted, it being immaterial and hearsay; also, that other evidence stricken out as not responsive, was responsive and material. *Logan v. Maytag*, 107.

2. **WHERE ONE PARTY IS DECEASED.** Undersection 3639, Code, where one party is deceased, the other may give testimony as to all matters, except upon personal transactions between the two. *Haverly v. Alcott et al.*, 171.
3. **EXCLUSION OF.** Evidence as to the ability of the plaintiff to pay a note, set up as a cross-demand, at any time after the execution of the same, is remote and was properly excluded. *Giddings v. Giddings*, 297.
4. **ACTION BY ADMINISTRATOR: FAILURE OF DEFENDANT TO TESTIFY.** In an action by an administrator for damages for the malicious killing of deceased, where the evidence was wholly circumstantial and consisted of distinct facts and circumstances having nothing of the character of personal transactions between the defendant and the deceased, the defendant is not rendered incompetent to testify as to the existence and true character of such facts and circumstances by section 3639, Code; and an instruction that if the defendant had not satisfactorily explained the material circumstances and transactions appearing in evidence against him by other testimony, then the fact that he was not a witness in his own behalf may be considered in evidence against him, was proper. *Miller v. Dayton*, 423.
5. **FAILURE TO PRODUCE WITNESS: PRESUMPTION.** The law does not require a party to account for his failure to produce any witness, who mistakenly or corruptly might be willing to testify to facts explaining circumstances casting suspicion upon such party. Under the facts of this case an instruction that such failure might be considered by the jury as a circumstance against the defendant was erroneous. *Id.*
6. **IMMATERIAL.** Evidence tending to show the fabrication of testimony by the defendant in order to avoid a criminal prosecution, although not prejudicial, was immaterial and irrelevant, and not admissible. *Id.*
7. **CORROBORATING TESTIMONY: CREDIBILITY OF WITNESS.** It is for the jury to determine the credibility of the witnesses, where there is contradictory evidence as to the corroborating facts. *The State v. Allen*, 431.
8. **IMMATERIAL.** Evidence tending to show how plaintiff understood the contract before the trade was consummated, but not shown to have been communicated to the defendant, and which would not throw any light upon the real contract between the parties, was properly rejected. *Garretson v. Bitzer*, 469.
9. **OPINION OF WITNESS: AT TIME OF TRIAL.** Where a witness had stated his opportunities for observation, and that he saw no fire, a question calling for his opinion at the time of the trial, as to whether or not there was a fire at the time and place referred to, was properly excluded, *Parkhurst v. Masteller*, 474.
10. **PARTY NOT BOUND BY.** The State, by introducing proof of certain testimony given by the defendant upon a former trial, is not bound thereby to admit that such testimony was true. *The State v. Lucas*, 501.
11. **LEVY ON GOODS: RES GESTÆ.** Where the question was whether the stock of goods, seized under an execution, was the property of the judgment debtor or a third party; whatever was said by the judgment debtor to a clerk when employed by him, as to whom he was employed for, was competent testimony as a part of the *res gestæ*. *Sweet v. Wright & Spencer et al.*, 510.
12. **DECLARATIONS OF PARTY IN POSSESSION OF PROPERTY.** The declarations of a party in the possession of property merely explanatory of such

possession are admissible in evidence; but where the declarations go further and detail the nature of the agreement under which possession is held, they are not admissible. *Id.*

13. **OF VALUE: VERDICT.** The evidence of the value of the building insured considered, and held sufficient to sustain the verdict. *Wilkins v. The Germania Fire Insurance Co. et al.*, 529.
14. **EXPERT: COMPETENCY OF WITNESS.** It is not necessary that a person be a medical expert before he can testify that his ribs were fractured. Any person who knows a fact may testify in regard to it. *Ferguson v. Davis County*, 601.
15. **DECLARATIONS OF PERSON INJURED.** In an action for personal injuries the declarations of the person injured, made after convalescence, as to the condition of his health and the pain he experienced, are not admissible. *Id.*
16. **COMPETENCY OF WITNESS: RELIGIOUS BELIEF.** Upon cross-examination a witness was allowed to be questioned as to his belief in a Supreme Being and in a state of future rewards and punishments. *Held*:
 1. That the religious belief of a witness might be shown for the purpose of affecting the credibility of his testimony, and that Art. 1, Sec. 4 of the Constitution did not prohibit such inquiry.
 2. That the want of such religious belief could not be established from the examination of the witness upon the stand. It must be shown, if at all, by his previous declarations voluntarily made. He cannot be required to divulge his religious opinions. *Searcy v. Miller*, 613.
17. **PERSONAL INJURIES: DAMAGES.** In an action for personal injuries sustained by a brakeman, while getting off a moving train to turn a switch, witnesses were allowed to testify that it was "in the line of his duty" for a brakeman to get off over the side of the car, while the train was in motion. *Held*, error. *Allen v. The B., C. R. & N. R. Co.*, 623.
18. —: —. Where witnesses for the plaintiff had testified that a certain "cattle chute" was constructed dangerously near the track, the evidence offered by the defendant that persons had frequently ridden past it holding to the side of the car, was proper and should have been received. *Id.*
19. **CRIMINAL LAW: TESTIMONY OF DEFENDANT.** The rules relating to the competency of testimony given by other witnesses, should be applied when the prisoner testifies in his own behalf; and the refusal to allow the prisoner to testify as to the statements of the person from whom he claimed to have received the property stolen, tending to show that he believed such person had the right to dispose of the same, was error. *The State v. Kelly*, 644.
20. **RAPE: BELIEF OF WITNESS.** In a prosecution for rape, the fact that a witness believed the prosecutrix unchaste would not be competent testimony. The prosecutrix could not be proven unchaste by proving that the witness believed her to be so. *The State v. Porter*, 691.
21. —: —: **CORROBORATIVE TESTIMONY.** If it be necessary that the prosecutrix should be corroborated, to sustain a conviction for administering a drug with intent, etc., of which there is doubt, and the question is not determined, such corroborative testimony exists in this case. *Id.*
22. **SUFFICIENCY OF: NEW TRIAL.** Where the evidence fully sustains the verdict, the judgment of the court below must be affirmed; and newly discovered evidence, which is merely cumulative, will not entitle the party to a new trial. *Hickenbottom v. The C., B. & Q. R. Co.*, 704.

23. **DAMAGE: ADMISSION OF.** In an action to recover for injury to stock by a railroad train, evidence that defendant's road-master agreed upon an arbitration is not competent to show the liability of the company. An offer to arbitrate is not an admission of liability, nor would any admission by the road-master, at another time and place, be deemed the admission of the company. *Mundhenk v. The C. I. E. Co.*, 718.
24. **CRIMINAL LAW: DECLARATIONS OF DECEASED.** To render the declarations of the deceased, in regard to the conflict which resulted in his death, competent evidence against the prisoner, it must be shown that they were made in the full belief of impending death. *The State v. Weaver*, 730.
25. **HYPOTHETICAL QUESTION: CONFLICTING TESTIMONY.** Where an expert was asked a hypothetical question, based upon facts in relation to which there was conflicting and contradictory testimony, and which virtually required him to place himself in the jury-box and weigh the testimony, the exclusion of the question was not error. *Smith v. Hickensbottom*, 733.
26. **WRITTEN INSTRUMENT: LOSS OF: SECONDARY.** The burden of showing the loss of a written instrument is upon the party who seeks to introduce secondary evidence thereof, and before secondary evidence is admissible it should clearly appear that proper efforts had been made to find the written instrument. A thing cannot be said to be lost or mislaid for which no search has been made. *Hansen v. The American Ins. Co.*, 741.
27. **NEGLECT AND CARE: VERDICT.** *Held*, that the evidence in relation to the defendant's negligence and the plaintiff's care, was sufficient to authorize the jury, without passion or prejudice, to find for the plaintiff. *Stafford v. The City of Oskaloosa*, 748.

See CRIMINAL LAW, 6, 7, 8, 9, 18.

GUARDIAN, 7.

MALICIOUS PROSECUTION, 2.

RAILROADS, 18, 22.

WILLS, 3.

EXECUTION.

1. **EXISTENCE OF: ISSUING SECOND EXECUTION.** An execution, ordinarily, must be regarded as existing until it has been returned; and in cases where that cannot be done, it devolves upon the party in interest to allege and prove facts, showing that a second execution might lawfully issue. *Merritt et al. v. Grover*, 493.
2. **—: SALE SET ASIDE.** Where the sale under the first execution was set aside, but the levy was not, it would seem an execution could properly issue as provided by section 3086, Code. *Id.*

See SURETY, 1, 2.

EXECUTION SALE.

1. **ADMISSION OF VALIDITY: REDEMPTION.** By attempting to redeem from an execution sale, a party admits the validity of such sale, and that the land was subject to the judgment. *Thayer v. Coldren et al.*, 110.

2. ———: **RIGHT OF REDEMPTION: VENDEE OF DEFENDANT.** The vendee of an execution defendant, whose lands are sold at execution sale, may redeem the lands to which he holds title from such sale, although the judgment defendant may have appealed the case. *Id.*
3. ———: **DEFENDANT.** The term "defendant" as first used in section 3102. Code, means the person holding the right to the possession of the lands sold, as the owner; as last used, it means the defendant in the action. *Id.*
4. **SHERIFF'S DEED: GROWING CROPS.** The execution of a valid sheriff's deed conveys the right to the immature crops growing upon the premises, and a person taking the same therefrom is not liable to the former owner of the land. *Martin v. Knapp et al.*, 336.
5. **JUDGMENT CREDITOR: PURCHASE BY.** Where the judgment creditor became the purchaser at a sale, under a second execution issued at his instance, before the first execution was returned, he was bound to know whether such second execution was lawfully issued. *Merritt et al. v. Grover*, 493.

See **HOMESTEAD**, 5.

EXECUTOR.

1. **NOTICE OF APPOINTMENT.** The statute, section 2366, Code, is directory: and the failure by a person appointed executor, to give notice of his appointment, as provided by statute, will not operate to annul the appointment or prevent him from discharging the duties pertaining thereto. *Johnson v. Barker*, 32.

See **ADMINISTRATOR**.

FRAUD.

1. **SPECIAL FINDINGS: CONSTRUCTION OF.** The special findings of the jury construed as not constituting fraud, under the facts in this case. *Wilson v. Irish*, 184.
2. **IN EXECUTION OF INSTRUMENT: PAROL PROOF.** It is competent to show by parol, that because of the fraud of a party to an instrument, it does not express the real agreement. *Hopkins v. The Hawkeye Ins. Co.*, 203.
3. **TRUSTEE: ACTION FOR VALUE OF PROPERTY.** Where the sale of property was induced by false representations as to its value, the sale is void, and the purchaser will be regarded as holding the same in trust for the owner. In such case the assignee of the owner may maintain an action to recover for the fraud, and the defendants cannot complain that the consideration paid was not returned before suit was brought. *Clews v. Traer et al.*, 459.
4. **PURCHASE OF STOCK OF GOODS.** The purchase of a stock of goods from an insolvent for a sufficient consideration, will be valid unless it was done for the purpose of aiding the debtor to hinder, delay or defraud his creditors. *Sweet v. Wright & Spencer et al.*, 510.
5. **CONFESSION OF JUDGMENT: EVIDENCE.** Evidence considered and held not sufficient to support the conclusion of the court below, that the signature to a certain *cognovit* was procured by fraud. *Jarosh v. Easton et al.*, 569.

6. **ACTION TO RECOVER: DEMAND.** Where the vendor seeks to recover goods, after they have been attached as the property of the vendee, upon the ground that he was induced to deliver them through fraud, the gist of the action being the title to the property, it is not necessary, in order to maintain the action, to allege and prove a demand. *Oswego Starch Factory v. Lendrum*, 573.
7. **ALLEGATIONS OF: RESCISSION OF SALE.** Allegations of fraud and fraudulent intentions considered. An intention on the part of the vendee not to pay for goods bought by him, which he conceals from the vendor, is a fraud which will authorize the vendor to rescind the sale. *Id.*

See ATTACHMENT, 2.

SALE, 1, 3, 4.

STATUTE OF LIMITATIONS, 3.

TRUST, 5.

FRAUDULENT CONVEYANCE.

1. **FRAUDULENT INTENT: GRANTOR AND GRANTEE.** To render a conveyance invalid, as between a fraudulent grantor and his grantee, it is not necessary that the fraudulent intent, or knowledge, should be traced to the grantee. *Weir v. Day*, 84.
2. **CLAIMS FOR TORTS: CREDITORS.** A person having a claim for a tort is a creditor, and where the conveyance was made with the intent in part to evade fines and judgments which might be obtained for torts, it renders the conveyance wholly fraudulent. *Id.*
3. **VOLUNTARY CONVEYANCE: CONSTRUCTIVE FRAUD.** Where a member of a partnership, which was largely indebted, made a voluntary conveyance of all his individual property, but without any purpose to defraud the firm creditors, such conveyance would be constructively fraudulent, and liable to be avoided. *Borhydt & Co. v. Perry et al.*, 416.
4. ———: **BY INSOLVENT: EVIDENCE.** Where an insolvent paid the consideration for certain real estate, and procured the conveyance of the same to his wife, it was held not to differ from a voluntary conveyance made by a husband, while insolvent, to his wife; and that the property was properly subjected to the payment of the husband's debts. *Gear et al. v. Schrei et al.*, 666.

GARNISHMENT.

1. **ASSIGNMENT: INTERVENTION.** In this case, *held*, that the plaintiff, by garnishment proceedings, acquired only the title and interest in the property held at the time by the defendant in the action; that a prior lawful assignment would hold the property; and that persons having any interest in the property might intervene. *Howe & Co. v. Jones et al.*, 130.
2. ———: **NOTICE OF.** Want of notice of the assignment of a cause of action will not prejudice a garnishee defendant, previously discharged. *Id.*
3. **JUDGMENT DEBTOR.** The garnishment of a judgment debtor, under section 2976, Code, does not affect the rights of claimants, but simply the liability of the garnishee. *Id.*

See PARTNERSHIP, 2.

GUARDIAN.

1. **ADDITIONAL BOND: LIABILITY OF SURETY.** Where a guardian filed a new bond with sureties, but was not discharged or re-appointed, nor were the sureties on the old bond discharged, and the evidence failed to show whether he then had the money previously received, or had misappropriated it, *held*, that such bond was an additional or cumulative security for the entire guardianship; and that the obligors thereon were liable for the entire defalcation. *Douglass v. Kessler et al.*, 63.
2. **ALLOWANCE FOR SUPPORT.** Where a guardian, who was also the step-father of his wards, and provided for them and received their services, the same as though they were his own children, had from time to time been allowed certain sums by the probate court for their support, the decree of the court below allowing him such expenditures, upon the final accounting, was approved. *Latham et al v. Myers*, 519.
3. **JUDGMENT: INCOME OF ESTATE.** Where the evidence showed that the judgment, in favor of the guardian for the support of his wards, could be satisfied out of the income of their estate, it was held proper under the pleadings. *Id.*
4. **LANDS OF WARD: REDEMPTION: TAX SALE.** A guardian may redeem the lands of his ward, sold for taxes, at any time before the execution of the deed, by payment to the auditor; after the execution of the deed he may redeem by an equitable action, under section 892, Code. *Witt, Guardian, v. Mewhirter*, 545.
5. **INTEREST OF WARD IN LAND: REDEMPTION.** Where the guardian holds a mortgage upon lands in trust for the ward, the ward has such an interest therein as will entitle him, or the guardian in his behalf, to redeem the land from tax sale. *Id.*
6. **ACTION TO REDEEM: WHEN BROUGHT.** Section 892, Code, does not limit the time within which the right of redemption attaches but prescribes the period of its duration. The action to redeem may be brought before the ward's disability is removed. *Id.*
7. **PERSON OF UNSOUND MIND: EVIDENCE OF.** In an action under section 2272 of the Code, for the appointment of a guardian of the property of a person of unsound mind, the evidence showed the defendant was very old, very infirm, bodily, and that his mind had shared in his physical disability. The jury found that the defendant was of unsound mind. *Held*:
 1. That the verdict was sustained by the evidence.
 2. That evidence of a conversation had by the witness with defendant was competent to show his mental condition, and that he felt his inability to properly manage and protect his property.
 3. That it was not the expression of an opinion for the witness to testify, by way of illustrating the imbecility of age, that the defendant "talked like a child."
 4. That in cases of this kind, after stating the facts upon which their opinion is based, non-experts may be allowed to give an opinion as to the defendant's soundness or unsoundness of mind. *Smith v. Hickenbottom*, 733.
8. **MIND: UNSOUNDNESS OF: WHAT CONSTITUTES.** An instruction, which distinguished unsoundness of mind from idiocy on the one hand and lunacy on the other, was correct. The statute designates three classes for whom guardians may be appointed, and the latter class must differ from either of the others. If, then, there is such mental weakness that

the judgment cannot be trusted in the management of business, a guardian should be appointed. *Id.*

See WILL, 2.

HABEAS CORPUS.

1. PETITION FOR: JURISDICTION. The allegations of the petition for a writ of *habeas corpus*, that minor children were concealed by the respondent in Polk or Dallas counties, were sufficient to give the court of Polk county jurisdiction, and authorized the issuance of the writ; and the fact set up in the answer, that the children were in a foreign jurisdiction did not deprive the court of jurisdiction, or excuse the respondent for not producing the children in court in obedience to the writ. *Rivers v. Mitchell*, 193.
2. RETURN: WHAT IT SHOULD SHOW. The return to the writ of *habeas corpus* should have shown that the respondent did not have the power to produce the children in court, in obedience to the writ. *Id.*
3. PRACTICE. This proceeding being regarded as an action at law, the court can only interfere where the finding below is manifestly unsupported by the evidence. *Kline et al. v. Kline et al.*, 336.

HIGHWAY.

1. DEDICATION OF IN PAIS: ESTOPPEL. Where a party holds title by the description given in a city plat, which does not recognize a highway, dedicated in *pais*, prior to the filing of the plat, he is not thereby estopped from asserting the existence of such highway. *Getchell et al. v. Benedict*, 121.

See DEDICATION, 2.

HOMESTEAD.

1. ELECTION: REASONABLE TIME. A surviving wife has a reasonable time in which to make her election whether she will retain the occupancy of the homestead, or claim her right to one-third of the entire real estate in fee-simple. *Cunningham v. Gamble*, 46.
2. PRODUCTS AND INCOME: The survivor, during the reasonable time that he or she may occupy the homestead prior to election, should be allowed to receive the profits and income thereof, and be accorded the same fullness of enjoyment as after election. *Id.*
3. RULE APPLIED. In this case it was held that the surviving wife was entitled to the rents of a coal mine upon the homestead, opened and in a workable condition, prior to her husband's death. *Id.*
4. LIABILITY FOR DEBT: EXEMPTION: BURDEN OF PROOF. In an action to subject a homestead to the payment of a debt contracted prior to its purchase, the burden of proof to show that it was purchased with the proceeds of the sale of a former homestead, and therefore exempt, is upon the defendant. *The First National Bank of Davenport v. Baker et al.*, 197.
5. PLATTING: EXECUTION SALE. The sale of lands at execution sale upon which the execution defendant resides, without platting and setting aside the homestead, is voidable, but not void, and cannot be attacked collaterally. *Martin v. Knapp et al.*, 336.

6. **INCUMBRANCE ON: DOWER.** An order of court, which set apart out of the homestead enough in value to satisfy the mortgage debt thereon, and then assigned as the widow's distributive share one-third in value of all the real estate without regard to the incumbrance, or requiring her to contribute toward its payment, approved. *Wells et al. v. Wells et al.*, 410.
7. **TEMPORARY ABANDONMENT: EVIDENCE OF.** The owner of a homestead left the same for a temporary purpose, and went to the State of Kansas with her husband, and kept house and abode there, but without any intention of permanently residing in Kansas. About a year later she died in Kansas, and her husband died there a few months later. *Held*, that her homestead rights still continued, notwithstanding the temporary abandonment; and that as her husband's distributive share in her estate was not set off to him during his lifetime the homestead was not liable for his debts, but descended to the children exempt from any antecedent debt of their parents or their own. *Bradshaw v. Hurst et al.*, 745.

See DOWER, 2, 5.

HUSBAND AND WIFE.

See DIVORCE.

DOWER.

FRAUDULENT CONVEYANCE, 4.

HOMESTEAD.

INHERITANCE.

See DESCENT.

INJUNCTION.

1. **ORDER FOR: JURISDICTION.** In injunction proceedings the order of a court having jurisdiction of the subject-matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed. *The State v. Baldwin*, 286.
2. ———: **CONTEMPT.** An attachment for contempt is the proper mode of enforcing obedience to a continuing order in the form of a mandatory injunction. *Id.*
3. **ORDINANCE: PUBLICATION.** An injunction cannot be maintained merely on the ground that the ordinance had not been published for the length of time provided by the city charter. *Dodge et al. v. The City of Council Bluffs et al.*, 580.
4. **PARTIES: MISJOINDER OF.** Several persons owning distinct tracts of agricultural lands, lying within an incorporated town, joined in an injunction suit to restrain the collection of municipal taxes thereon. The land was not similarly situated in respect to the town and the plaintiffs did not all ask the same relief. *Held*, that there was a misjoinder of parties and causes of action; and that the plaintiffs having failed to strike out all the parties plaintiffs except one, the court did not err in dissolving the injunction and dismissing the case. *Lewis et al. v. Eshleman et al.*, 633.

See DIVORCE, 3.

INSTRUCTION.

1. **UNCERTAIN.** If the true meaning of the instruction was sufficiently plain, and could not have been misunderstood by the jury, there was no error for uncertainty. *Reed v. The C., R. I. & P. R. Co.*, 23.
2. **PRACTICE.** Where there was no evidence whatever, tending to show collusion, an instruction directing the jury to inquire whether the goods were seized by collusion on the part of the defendants was erroneous. *Furman v. The C., R. I. & P. R. Co.*, 42.
3. **FOLLOWED IN THE SENSE INTENDED.** Where an instruction was intended in a correct sense, and was understood and followed by the jury in the sense intended, the case will not be reversed because the language used, technically construed, might have a different meaning. *Parkhurst v. Masteller*, 474.
4. **CONSIDERED TOGETHER.** All the instructions must be read and considered together, and where it is not probable the jury have been misled by the omission of a certain qualification in one which was explicitly given in others, there was no error. *Allen v. The B., C. R. & N. R. Co.*, 623.
5. **REFUSAL TO GIVE.** Where the doctrine of an instruction asked was fairly presented in one given by the court, the refusal to give it, though proper in itself, was not error. *Id.*
6. **EVIDENCE.** An instruction asked by the defendant, and based upon evidence not found in the record, was properly refused. *Mundhenk v. The C. I. R. Co.*, 718.
7. **MISLEADING.** The giving of an instruction, based upon a theory wholly unsupported by the evidence, was misleading, and prejudicial error. *Id.*

See CRIMINAL LAW, 2, 3.

DAMAGE, 8.

NUISANCE, 2.

INSURANCE.

1. **MORTGAGE: SUBROGATION.** A mortgagee has no interest in the policy of insurance issued to the mortgagor for his own benefit. Under the facts in this case it was held that the mortgagee could not be subrogated to the rights of the mortgagor under the policy of insurance. *Ryan v. Adamson et al.*, 30.
2. **CONTRACT FOR: POWER OF COMPANY.** Conceding that making application for insurance, and the payment of part of the premium to an agent, created a contract of insurance between the party and the company, yet the insurance company had the power to reject the application and thereby annul the contract. *Otterbein v. The Iowa State Insurance Co.*, 274.
3. **REJECTION OF RISK: SUBSEQUENT LOSS.** The company having exercised its right to reject the risk, the law will not hold it bound to pay a subsequent loss, because the agent, by arrangement with the party making the application, retained the premium note given, and the portion of the premium paid, while attempting to induce the company to reconsider its action. *Id.*

4. **WARRANTY: BREACH OF: BURDEN OF PROOF.** Where the warranty contained in an application for fire insurance was, that the statements were "*just, full and true, so far as the same are known to the applicant,*" the absolute truth of the facts stated was not warranted; and the burden was upon the company to prove a breach of the warranty. *Wilkins v. The Germania Fire Insurance Co. et al.*, 529.
5. ———: **DESCRIPTION OF BUILDING.** Where the building insured was described as "two stories high," and the main part was two stories high, but a small, rear addition was only one story high, such inaccuracy of description would not constitute a breach of the warranty. *Id.*
6. **PROOFS OF LOSS: MOTION TO DISMISS: PRACTICE.** The objection that the proofs of loss were not made in time is not reviewable under the circumstances of this case. Where a party demurs to the evidence, or moves to dismiss for insufficiency of the evidence, he must be deemed to have waived his exception to the admissibility of the evidence, and on an appeal from the ruling upon the motion to dismiss, this court can only review the correctness of that ruling. *Id.*
7. ———: **FALSE STATEMENTS.** Where the agent of the insurance company fully knew the purpose for which a certain building was used and occupied at the time it was destroyed by fire, this would not excuse the insured for knowingly making false statements, as to such use and occupation, in the proofs of loss. *Hansen v. The American Insurance Co.*, 741.

See PRACTICE, 7.

INTEREST.

1. **CONTRACT FOR: PLEADING.** Where a party set up a parol contract to pay ten per cent interest, but only claimed six per cent, it was held that ten per cent included six per cent, and that plaintiff could declare on an express parol contract to pay ten per cent interest, as creating a liability to pay six per cent, and recover thereon. *Brockway v. Haller*, 368.

INTERVENTION.

1. **BY ASSIGNEE IN BANKRUPTCY.** The assignee acquires such an interest in the property of the bankrupt as authorizes him to intervene under section 3228 of the Code, or maintain an independent action for the recovery of the property fraudulently conveyed by the bankrupt. *Wetmore v. McMillan et al.*, 344.

See ATTACHMENT, 4.

REPLEVIN, 1.

INTOXICATING LIQUORS.

1. **UNLAWFUL SALE: CHARGE UPON THE PREMISES: CONSENT OF OWNER.** In order to charge the premises with the lien of a judgment for damages, resulting from the unlawful sale of intoxicating liquors thereon, it is necessary to show that the owner of the premises had knowledge of such unlawful use of the same, and also that he consented thereto. *Meyers v. Kirt et al.*, 421.
2. **ACTION FOR DAMAGES: JOINT AND SEVERAL LIABILITY.** Under the pleadings and evidence in this case, an instruction that if defendant sold beer to plaintiff's husband, which with beer sold him by others,

produced "fits of intoxication," he was liable for all the damage caused thereby, was erroneous. The persons furnishing the liquor were not joint wrong-doers, but each was severally liable for the damage caused by his own acts. *Richmond v. Shickler et al.*, 486.

3. **LICENSE: SURETY ON BOND.** Where the defendant was licensed by an incorporated town to sell ale, wine and beer, and gave a bond with surety to pay any damage any person might sustain by reason of his sale of beer or liquor, the surety would be liable thereunder for all damages recoverable, whether compensatory or exemplary, not exceeding the amount of the bond. *Id.*
4. **SALE OF: MONTHLY STATEMENT: ACTION FOR PENALTY.** The provisions of section 1537, Code, that every person having a permit to sell intoxicating liquors shall make a return of his sales on the last Saturday of each month, as to the time of filing the return, are not mandatory. The statute is so far directory as to authorize the return to be filed at any time before an action is commenced for the recovery of the statute penalty. *Abbott v. Sartori*, 656.
5. **UNLAWFUL SALE BY REGISTERED PHARMACIST.** Where a registered pharmacist sold a pint of whisky to a stranger upon his mere statement that he wanted it for medicine, it was held that the court could well have found the liquor was sold as a beverage, in violation of the pharmacy law of 1880; and that a judgment of conviction would not be disturbed. *The State v. Knowles*, 669.

See JUSTICE OF THE PEACE, 4.

JUDGMENT.

1. **ERROR WITHOUT PREJUDICE.** A judgment will not be disturbed for an error in the admission of testimony that works no prejudice. *Murray v. Wells*, 26.
2. **OF JUSTICE OF THE PEACE: IN REM: RE-TRIAL.** A judgment *in rem* of a justice's court, entered upon service by publication, and without appearance by defendant, may be set aside, and the cause re-tried, upon proper application made within two years, under section 2377, Code. Section 3543, Code, is only applicable in cases of personal service. *Taylor & Farley Organ Co. v. Plumb et al.*, 33.
3. **AGAINST PARTNERS INDIVIDUALLY.** Where the petition, in an action against a partnership, did not ask for a judgment against the partners individually, it was irregular to render a judgment against them as individuals; but such judgment would not be void for want of jurisdiction, and could not be attacked collaterally. *Marsh v. Mead & Co. et al.*, 535.
4. **INJUNCTION: TENDER.** Where the plaintiff in his petition for an injunction to restrain the collection of a judgment, pleaded payments upon the judgment, and also contested in good faith the validity of the entire judgment, a tender of the amount not claimed to have been paid before commencing the action was not necessary. *Id.*
5. **COGNOVIT: SURETY.** A certain *cognovit*, set out in full in the opinion, construed not to authorize a judgment against a party who signed the same as surety. *Jarosh v. Easton et al.*, 569.
6. **CASE REMANDED FOR: MOTION FOR: PRACTICE.** Where a case is tried *de novo* in the Supreme Court, and is reversed and remanded for judgment without any other directions, judgment must be rendered as a

matter of course and upon motion, unless the unsuccessful party shall bring himself within some recognized rule which would entitle him to a new trial. *Austin v. Wilson et al.*, 586.

See MORTGAGE, 3.

NOTICE, 1.

JURISDICTION.

See APPEAL, 1, 4.

HABEAS CORPUS, 1.

INJUNCTION, 1.

PLEADING, 1.

DIVORCE, 2.

JUSTICE OF THE PEACE, 4.

JURY.

1. MISCONDUCT OF: VERDICT SET ASIDE. The evidence in relation to the alleged misconduct of a juror considered. *Held*, that while it does not appear in this case that any wrong was intended or any prejudices wrought, prudence and a desire to secure the pure administration of the law require that the verdict be set aside. *Stafford v. The City of Oskaloosa*, 748.

See PRACTICE, 10.

JUSTICE OF THE PEACE.

1. APPEAL: NOTICE OF. Under section 4697, Code, when the justice informs the defendant of his right to appeal, and the defendant gives the requisite notice, the appeal is taken. *Anderson v. Park*, 69.
2. ILLEGAL COMMITMENT: PETITION: SUFFICIENCY OF. Where the petition in an action upon a justice's bond for illegal commitment, after the conviction, fails to show that the necessary steps to stay the judgment were taken, or that the justice did anything more than the law required or empowered him to do, it is not sufficient. *Id.*
3. FEES. A justice of the peace is entitled to a trial fee in default cases, and in cases coming under sections 3541 and 3542, Code, he is authorized to charge both a trial fee and a fee for entering judgment by default. *Shaw v. Kendig*, 390.
4. JURISDICTION OF JUSTICE OF THE PEACE. A prosecution under the pharmacy law of 1880, for the sale of intoxicating liquors as a beverage, is within the jurisdiction of a justice of the peace. *The State v. Knowles*, 669.

See JUDGMENT, 2.

LANDLORD AND TENANT.

1. ACTION FOR RENT: ATTACHMENT: LIEN. An action for rent, commenced by ordinary attachment before the rent was due, cannot be

deemed an action to effect a landlord's lien, and plaintiff takes thereby only such lien as an ordinary attachment gives. *Clark v. Haynes*, 96.

2. **ATTACHMENT: MORTGAGE: PARAMOUNT LIEN.** In May, 1878, plaintiff leased certain premises to F. by an oral lease. In May, 1879, F. purchased furniture for use on the premises, and nine months afterwards executed a mortgage thereon to secure the purchase-money. On October 1, 1880, the lessor levied a landlord's attachment upon the furniture for the last five and one-half months rent: *Held*, that the landlord had no lien for the rent in question, at the time the lien of the mortgage attached, and that the mortgage lien was paramount. *Thorpe Bros. & Co. v. Fowler et al.*, 541.

LEASE.

1. **ASSIGNMENT OF: RIGHTS OF ASSIGNEE.** The assignment of a lease, in good faith, by one who has neither the possession nor right of possession of the crops, invests the assignee with all the interest the assignor had thereunder, and is valid as against creditors and purchasers of the assignor, without notice, and will enable the assignee to maintain replevin against them to recover such interest. *Lufkin & Wilson v. Preston*, 28.
2. **VOID: RATIFICATION OF.** The mere occupation of premises will not amount to a ratification of a void lease. Some new promise or condition in respect thereto is necessary. *McIntosh v. Lee*, 356.

See PLEADING, 4.

LIFE ESTATE.

1. **CONTRACT FOR: BREACH OF: MEASURE OF DAMAGES.** For the breach of a contract to convey a life estate in certain premises, the plaintiff is entitled to recover the present worth of such life estate, reckoned on a basis of six per cent and no more. To multiply the annual rental value of the premises by the expectancy of life, was an improper method of computation. *Mallie v. Willett*, 705.

See DOWER, 5.

LIS PENDENS.

1. **ACTION: CONSTRUCTIVE NOTICE.** A party purchasing land will be charged with notice of the pendency of an action affecting the same, from the time the petition is filed; and the facts that the action was not properly indexed in the appearance docket, and that the notice was not served until after the purchase, are immaterial. *Haverly v. Alcott et al.*, 171.

MALICIOUS PROSECUTION.

1. **ADVICE OF COUNSEL.** Before the defendant in an action for malicious prosecution can shield himself, under the advice of counsel, he must show that in good faith he stated the facts fully to his attorney. *Logan v. Maytag*, 107.
2. **EVIDENCE BEFORE GRAND JURY.** In an action for malicious prosecution, a grand jurymen was asked, on cross examination, if the evidence of the defendant, then the prosecuting witness, was taken into consideration by the jury in finding the indictment. *Held*, improper. *Parkhurst v. Masteller*, 474.

3. **ADVICE OF COUNSEL: BAD FAITH.** An instruction that if counsel and client acted in bad faith in the prosecution, the advice of counsel would not constitute a defense, was not prejudicial error, though there was no evidence that the counsel acted in bad faith. *Id.*
4. **PROOF OF GUILT.** In an action for malicious prosecution, if the defendant can satisfy the jury that the plaintiff, notwithstanding his acquittal, was in fact guilty, no recovery can be had; and in view of the evidence of actual guilt in this case, the instruction as to belief and probable cause should have been so qualified. *Id.*
5. **GUILT MAY BE SHOWN.** In an action for malicious prosecution the defendant may show the guilt of the plaintiff, under the general issue, especially when the guilt consisted of facts known to the prosecutor at the time; and where there was evidence from which the jury might have believed the plaintiff was guilty, though discharged by the examining magistrate, an instruction that the plaintiff was not guilty of the crime charged was erroneous. *Bruley v. Rose et al.*, 651.

See **DAMAGE**, 4, 5.

MANDAMUS.

1. **BOARD OF SUPERVISORS: DIVISION OF TOWNSHIP.** Under section 382, Code, the board of supervisors have no discretion, and must divide a township where all the prerequisites of the law have been complied with, and the petition therefor is presented at the time authorized by statute. *Henry et al. v. Taylor et al.*, 72.
2. **JURISDICTION OF COURT: POWER TO GRANT.** Under the facts in this case, *held*, the court had jurisdiction of the subject-matter and power to grant *mandamus*. *Id.*

MECHANIC'S LIEN.

1. **STATEMENT.** The statement for a mechanic's lien should set forth the time when the materials were furnished, and should show the account upon which the demand is founded. The simple statement that a certain sum is due is not sufficient. *Valentine v. Rawson et al.*, 179.

MORTGAGE.

1. **OF CROPS NOT PLANTED: INDEFINITE DESCRIPTION.** In this case it was held that the description in the mortgage was indefinite and uncertain, and that before a mortgage on crops to be sown or planted can be regarded as valid, as against third persons, the year or term in which the crops are to be grown must, at least, be stated. *Pennington v. Jones*, 37.
2. **JUDGMENT LIENS: AFTER ACQUIRED TITLE.** A mortgage of lands not owned by the mortgagor, will attach and become a lien thereon, there being no intervening equities, the moment the mortgagor acquires title to the land, and it cannot be divested by, or rendered subordinate to, the lien of subsequent judgments. *Rice v. Kelso*, 115.
3. **FORECLOSURE OF: JUDGMENT LIENS.** Holders of judgment liens, not made parties in the foreclosure of a superior mortgage, have their right of redemption, but cannot acquire titles under execution sales that will defeat the mortgage title. *Id.*
4. ———: **SENIOR AND JUNIOR MORTGAGEES: STATUTE OF LIMITATIONS.** The foreclosure by a senior mortgagee will not affect the rights of a junior mortgagee not made a party. In such case, however, the junior

mortgagee can only acquire possession by redemption, and all right to redeem or to obtain possession, will be barred by limitation in ten years. *County of Floyd v. Cheney*, 160.

5. **OF CHATTELS: RELEASE OF: ASSIGNMENT OF NOTES.** Where a mortgage given to secure several notes, was released of record by the mortgagee, who had previously assigned the notes and supposed they had been paid, such release will not discharge the mortgage as to any one of said notes, in the hands of an assignee, remaining unpaid. *Martindale v. Burch*, 291.
6. **OF CROPS TO BE GROWN: PRIORITY OF.** Where two mortgages are given upon certain crops to be grown, they are entitled to precedence in the order of their execution and recording, although the second mortgage was given for the purchase-price of the seed from which the crops were to be grown. *Bradley v. Gelkinson*, 300.
7. ———: **ESTOPPEL.** The fact that the first mortgagee, knowing that the second mortgagee had taken possession of the crop, made no claim thereto until the same was harvested and threshed, would not estop him from asserting his claim. *Id.*
8. **APPLICATION OF PROCEEDS.** Where the proceeds of mortgages, executed to secure an individual note and a joint note, were not sufficient to pay both, the holder of the notes was under no obligation to apply the sum realized upon both notes, *pro rata*, but might apply the entire sum upon the individual note. *Small v. Older*, 326.
9. **UPON CROPS TO BE GROWN: VALIDITY OF.** Whether a chattel mortgage, upon crops to be planted or grown by the mortgagor in the future, is valid, as against the creditors of the mortgagor, *quere*. *Muir v. Blake et al.*, 662.
10. ———: **INDEFINITE DESCRIPTION OF MORTGAGED PROPERTY.** Where the description of the property mortgaged was "all the crops raised by me in any part of Jones county for the term of three years," it is too indefinite and uncertain to charge third persons with notice of the mortgage. *Id.*
11. **FORECLOSURE OF: GOOD FAITH.** Evidence of the foreclosure of a chattel mortgage and sale of the property considered. *Held*, that no want of good faith or diligence on the part of the mortgagees was shown. *Gear et al. v. Schrei et al.*, 666.

See LANDLORD AND TENANT, 2.

RAILROADS, 16.

TRUST, 3.

MUNICIPAL CORPORATIONS.

1. **CITY ORDINANCE: NUISANCE.** A city ordinance which declares the keeping of a house where loud and unusual noises are permitted a nuisance, and provides that whoever is convicted thereof shall be punished, is valid under section 456 of the Code. It does not define an offense punishable by the laws of the State. *The City of Centerville v. Miller*, 56.
2. **SEWERAGE DISTRICTS.** Cities of the first class, under chapter 162, acts of the seventeenth General Assembly, have authority to constitute but one sewerage district for the entire city. *Grimmell v. The City of Des Moines*, 144.
3. **SEWERS: ORDINANCE: RESOLUTION.** Where the ordinance of a city

providing for the construction of sewers also provides that the council may order the construction of a sewer by resolution, and the resolution is passed, it is sufficient; and when such resolution does not provide for contracting the work, its passage need not be upon the call of yeas and nays. *Id.*

4. ———: **ASSESSMENT: CHANCERY.** The assessment of property for the construction of a sewer in this case was not inequitable, and if there was inequality in the assessment, chancery will not hear the complaint, unless the party pay, or offer to pay, the portion of the tax justly due. *Id.*
5. ———: ———. Where the sewer is a unit, though constructed along more than one street, a single assessment therefor is valid. *Id.*
6. ———: ———. An assessment for a sewer is not rendered invalid because the resolution ordering the same did not direct the manner of payment. *Id.*
7. ———: ———: **EXCESSIVE.** Under chapter 162, acts of the seventeenth General Assembly, the city did not exceed its authority in making the assessment for sewerage purposes.
8. **ORDINANCE: DISORDERLY HOUSE.** A city has power under the general incorporation law of the State to pass an ordinance for the punishment, by fine, of the keeper of a disorderly house. Following *The City of Centerville v. Miller*, ante, p. 56. *The City of Centerville v. Miller*, 225.
9. **CERTIORARI: WHO MAY MAINTAIN.** A citizen and resident taxpayer may maintain the action of *certiorari* to annul the proceedings of a city council, in relation to the unlawful reduction of assessments. *Collins v. Davis et al.*, 256.
10. ———: **ACTION OF COUNCIL.** The action of the city council in passing upon a petition for the reduction of taxes is a judicial act, and may be reviewed by *certiorari*. *Id.*
11. ———: **REDUCTION OF ASSESSMENTS: AUTHORITY OF COUNCIL.** The reduction of an assessment by the city council, after the delivery of the duplicate taxes to the collector, is without authority and void. *Id.*
12. **RIPARIAN PROPRIETORSHIP.** Where a stream meanders through a city, and lots and streets have been platted without reference to it, nor bounded by it, the doctrine of riparian proprietorship is not applicable; and an instruction applying that doctrine to this case was error. *Hoehl v. The City of Muscatine*, 444.
13. **BRIDGES AND CULVERTS: GOOD FAITH.** Under the circumstances of this case, an instruction that the adoption in good faith by the defendant, of the plans of skillful and competent engineers and workmen, in constructing and repairing bridges and culverts across the creek in question, would not protect the defendant, was erroneous. Where the city acts in good faith in this respect and an unexpected damage results, the city is not liable. *Id.*
14. **ORDINANCE: LIMITING SPEED OF RAILWAY TRAINS.** Municipal corporations have authority, as a police regulation, to pass ordinances regulating the speed of railway trains within the corporate limits, but such regulations must be reasonable and proper. *Meyers v. The C., R. I. & P. R. Co.*, 555.
15. **FOREIGN CORPORATIONS: POWER TO CONDEMN PROPERTY.** A municipal corporation has authority, under sections 471-4, Code, to contract with a foreign corporation for the construction of water-works, and where it does so contract, such foreign corporation, under the statute and a proper ordinance, may have power to condemn and appropriate private

property necessary for the works. *Dodge et al. v. The City of Council Bluffs et al.*, 560.

16. **WATER-WORKS: EXCLUSIVE RIGHT.** The plaintiffs, as mere taxpayers, cannot raise the question whether the city had power to grant by ordinance, to one company, the exclusive right to construct and operate water-works. *Id.*
17. **ORDINANCE: ASSIGNMENT OF RIGHT.** Where the ordinance granting the right to construct water-works provided that the company might assign all its rights and privileges, the provision, if void, would not affect the right of the company to proceed with the work. *Id.*
18. **STREETS: NEGLIGENCE.** Where a street has been opened for public use and travel throughout its entire width, it then becomes the duty of the city to keep it in a reasonably safe condition for the entire width thereof, from sidewalk to sidewalk. *Stafford v. The City of Oskaloosa*, 748.

See **DAMAGE**, 3.

INJUNCTION, 4.

NEGLIGENCE, 1.

RAILROADS, 14.

NEGLIGENCE.

1. **CONTRIBUTORY: INSTRUCTIONS: ORDINARY CARE.** In an action against a city to recover for an injury to a building, alleged to have been caused by the wrongful and negligent obstruction of the natural channel, and diversion of the course of a stream by the defendant, the failure of plaintiff to use ordinary diligence and effort to prevent damage, and to incur moderate expense, if thereby the injury might have been prevented, would constitute contributory negligence, and entirely bar recovery; and an instruction that in such case he would still be entitled to recover such sum as would have prevented the injury, if it had been expended, was erroneous. *Hoehl v. The City of Muscatine*, 444.
2. ———: ———: **DIVERSION OF STREAM.** An instruction that if the plaintiff erected his house where the creek had flowed for ten years, and where, but for the house, it would still have flowed, and the damage was caused thereby, he would still be entitled to recover, unless it had so flowed with his knowledge and consent, was erroneous. In such case he had no right to divert the flow of the creek, whether such flow had been with his knowledge and consent or not. *Id.*
3. **COUNTY BRIDGES: NOTICE OF DEFECT.** Where the board of supervisors had been informed of the dangerous condition of a county bridge, and had failed to examine or repair it, it was negligence, although the bridge had been examined two and one-half years before, and reported reasonably safe for about four years. *Ferguson v. Davis County*, 601.
4. **KNOWLEDGE OF.** The knowledge, or want of knowledge, on the part of plaintiff that his friend, who was driving when the accident occurred, was an habitually careless driver, is immaterial. If his friend was negligent on this occasion, he cannot recover. *Stafford v. The City of Oskaloosa*, 748.

See **CLERK**, 1.

PROMISSORY NOTE, 1.

RAILROADS, 15.

NEW TRIAL.

1. **ORDER FOR: JURISDICTION.** Where the court below having jurisdiction grants a new trial, the order, however erroneous, is not void. *Loomis v. McKenzie*, 77.
2. ———: **APPEAL FROM: EXECUTION.** Where the order granting a new trial was appealed from and superseded, it will not authorize the issuance of an execution on the judgment rendered in the case. Such a judgment, for all purposes relating to its enforcement, would be a nullity, until the question had been determined whether the new trial had been properly granted. *Id.*
3. **DEFAULT: MOTION TO SET ASIDE.** The facts in this case excusing default in the court below, were not sufficient to entitle the defendant to a new trial. *Gifford v. Cole*, 272.
4. **INSTRUCTION: JURY.** Where the jury disregard, or fail to follow, the instructions of the court, upon a point concerning which there was no conflict in the testimony, a new trial should be granted. *Hansen v. The American Insurance Co.*, 741.

See JUDGMENT, 6.

EVIDENCE, 22.

NOTICE.

1. **CONSTRUCTIVE: OF JUDGMENT: MISNOMER.** Where two names, differing in sound, are commonly used as the same or are derived from the same source, as understood in the English language, the use of one for the other is no misnomer. *Held*, that "Helen" and "Ellen" are distinct names, and that the judgment entered and indexed against Ellen Desney was not constructive notice of a lien against the lands of Helen Desney. *Thomas v. Desney*, 58.
2. ———: ———: **INDEX.** Where a party is not charged with constructive notice by the index book of judgments, he is not bound by what appears of record. *Id.*

See DEED, 1.

LIS PENDENS, 1.

PRINCIPAL AND AGENT, 1.

NUISANCE.

1. **FINDINGS OF JURY: STATUTE OF LIMITATIONS.** Where, in an action for damages for the erection and use of gas works, the jury found the works were of a permanent character, but considered they were incompetent to decide whether such erection and use were a permanent injury to plaintiff's property, it was held the jury intended and found thereby that the injury was of a permanent character, and began when the works were erected and used; and that the action was barred in five years after such erection and use. *Baldwin v. The Oskaloosa Gas Light Co.*, 51.
2. **DAMAGES: INSTRUCTIONS.** The instructions should state clearly and explicitly what damages are recoverable for, and that a party is only liable for the nuisance caused by himself. *Id.*

See MUNICIPAL CORPORATIONS, 1.

PARTNERSHIP.

1. ACTION UNDER SECTIONS 9053 AND 9054, CODE. Where it is sought to reach the interest of a party in a partnership, the burden of proof is upon the plaintiff to show that the party is a member of the partnership; and where such fact is not established by the evidence, the appointment of a receiver to determine the value of his interest in the partnership is error. *Dupuy & Howell v. Sheak & Sharra*, 361.
2. ———: GARNISHMENT. Where a party simply represents his wife in the firm business, the partnership owes him nothing for services which can be reached by garnishment. *Id.*
3. VOLUNTARY CONVEYANCE: SUBSEQUENT CREDITORS. Where the conveyance was voluntary, and included all of the individual property of one member of the partnership, which was largely indebted at the time, subsequent creditors whose means have been used to pay off the prior indebtedness will be subrogated to the rights of the prior creditors, and they may avoid such conveyance. *Barhydt & Co. v. Perry et al.*, 416.

See FRAUDULENT CONVEYANCE, 8.

JUDGMENT, 3.

PENSION.

1. EXEMPTION: WHEN LIABLE TO ATTACHMENT. Where a pensioner received the pension due him under the acts of Congress, on account of physical disability, received while serving as a soldier in the late war, in the form of a draft, drew the money on the draft and deposited the same in a bank to his credit, it was not exempt, in the hands of the bank, from the process of attachment for the pensioner's debts. *ROTHROCK and BECK, JJ., dissenting. Webb et al. v. Holt et al.*, 712.

PLEADING.

1. STATUTE OF LIMITATIONS. Under the allegations of the petition, which do not charge fraud or set forth the fraudulent acts complained of, the court might properly have held this was a proceeding to open the settlement under section 2475, Code, and was barred after three months. *Kous v. Mowery*, 20.
2. DEMURRER. A demurrer can be predicated only upon matters appearing in the pleading. *Collins v. Davis et al.*, 256.
3. JURISDICTION: PRACTICE. Where a petition avers a want of jurisdiction, and does not set out the facts upon which the alleged want of jurisdiction is based, a motion for a more specific statement is proper, and if made should be sustained. *Crowdson v. Middleton*, 335.
4. EVIDENCE: JUDICIAL NOTICE. Where the petition alleged that the written lease in question was executed March 10th, 1878, which was Sunday, and the lease bore the same date, parol evidence that it was not executed on the day it bore date was incompetent. Courts will take judicial notice that a particular date falls on Sunday. *McIntosh v. Lee*, 356.
5. NEW CAUSE OF ACTION. Held, that the cause of action in this case was based upon the fraudulent conversion of the money to which plaintiff was entitled, and that the amendment did not set up a new cause of action. *Clews v. Traer et al.*, 459.

6. **AMENDMENT: WHEN ALLOWED.** Under the issues and circumstances of this case an amendment conforming the allegations of the petition to the facts proved, though offered after the argument of counsel, was proper and should have been allowed. *Tiffany v. Henderson*, 490.
7. **RELEASE OF JOINT TORT-FEASOR.** The release of one joint tort-feasor is the release of all. *Held*, that this defense was sufficiently presented by the answer in this case, and that the verdict based upon such release, was supported by the evidence. *Long v. Long*, 497.
8. **CONFESSION AND AVOIDANCE: SUFFICIENCY OF.** The allegations of the answer held to sufficiently confess the facts averred in the petition to permit the defendant to plead matters in avoidance. *Abbott v. Sartori*, 656.

See ASSIGNEE AND ASSIGNMENT, 5.

PRACTICE, 12.

PLEDGE.

1. **LARCENY OF THE THING PLEDGED BY THE PLEDGOR.** Property was pledged as security for a debt. Afterward the pledgor obtained possession thereof for a special purpose, with the consent of the pledgee, and thereupon took the property out of the county, and there was evidence tending to show that the pledgor obtained possession of the thing pledged with the felonious design of depriving the pledgee of his security. *Held*:
 1. That the pledgee had a special property in the thing pledged.
 2. That if the pledgor obtained possession of the thing pledged by deception and false pretense, the pledgee could not be deemed to have released his lien or special property therein.
 3. That where the taking was with the felonious design to deprive the pledgee of his security, the pledgor would be guilty of larceny of the thing pledged. *Bruley v. Rose et al.*, 651.

POSSESSION.

See CONVEYANCE, 6.

EVIDENCE, 12.

TENANT AT WILL, 2.

PRACTICE.

1. **EVIDENCE: ADMISSION OF.** Where certain evidence was ruled out, but afterward the same in substance was admitted, it was held, if error, to be error without prejudice. *Reed v. The C., R. I. & P. R. Co.*, 23.
2. **INTERROGATORIES TO JURY.** The interrogatories submitted to the jury for special findings, must present specific questions of fact. *Lewis v. The C., M. & St. P. R. Co.*, 127.
3. **APPOINTMENT OF RECEIVER: NOTICE.** The appointment of a receiver in vacation, and without notice to the adverse party, was error. *Howe & Co. v. Jones et al.*, 130.
4. **SPECIAL FINDINGS: VERDICT.** The special findings being inconsistent with the general verdict, no judgment should have been rendered on the verdict. *Aldrich v. Price & Co.*, 151.

5. **DECREE: TRIAL UPON ISSUES OF FACT.** Where the decree recites that "the issues are found for the plaintiff, and that the allegations of the petition are true," it will be construed to imply there was a trial upon the issues of fact. *County of Floyd v. Cheney*, 160.
6. ———: **NOT VOID.** A decree entered by default, by a judge who had been attorney for one of the parties in the transaction, is not for that reason void under section 2685, Revision. *Id.*
7. **INSURANCE: DEFENSE: RECOVERY.** Whatever the defense relied upon, the plaintiff cannot recover more than, by his own showing, he is entitled to. *Hopkins v. The Hawkeye Insurance Co.*, 203.
8. **FINDING OF COURT.** The finding of the court upon a question of fact has the same effect as the verdict of a jury, and will not be reversed unless clearly unsupported by the evidence. *American Express Co. v. Smith & Crittenden et al.*, 242.
9. **COURT RECORD: BAR DOCKET.** A bar docket is not a part of the court record, and is not available on appeal to show that a case was disposed of out of its order, unless duly incorporated in, or sufficiently identified by, a bill of exceptions. *Gifford v. Cole*, 272.
10. **JURY: WAIVER OF.** Where the defendant in a civil action failed to appear at the trial, he will be deemed to have waived a jury. *Id.*
11. **VARIANCE BETWEEN ALLEGATIONS AND PROOF.** A party is not bound to prove number and price exactly as alleged; it is essential only that the substance of the issue be proved; and the objection as to the variance, not having been presented to the court below, cannot avail here *Wilcox v. Jackson*, 278.
12. **AMENDMENT: PRESUMPTION.** Where the transcript shows an amendment to the petition by interlineation conforming it to the proof, but fails to show when the same was made, it will be presumed it was made at the time the testimony was introduced, and by leave of court. *Giddings v. Giddings*, 297.
13. **EVIDENCE CONFLICTING.** The evidence as to the validity of the note and mortgage, set up as a cross-demand, being in conflict, the findings of the court will not be interfered with. *Id.*
14. **COMMISSIONER: APPOINTMENT OF.** The appointment of a commissioner to execute the deed for the right of way, upon the tender of the amount agreed upon therefor, without giving the party a reasonable time in which to execute it, if irregular, worked no prejudice, and affords no ground for reversal. *Robertson v. The Central Railway Co.*, 376.
15. **FINDING OF THE COURT: SUFFICIENCY OF EVIDENCE.** The finding of the court stands as the verdict of a jury, and cannot be disturbed unless so clearly opposed to the evidence as to indicate that it was the result of passion or prejudice. *Woodman v. Dutton*, 442.
16. **APPEAL: BILL OF EXCEPTIONS.** Where time was given in which to file a bill of exceptions, the fact that the appeal was perfected before the same was filed, would not preclude the court from settling and signing the bill. A party can appear in the court below and have the record corrected after an appeal has been perfected. *Tiffany v. Henderson*, 490.
17. **RECALL OF WITNESS: DISCRETION OF COURT.** It rests in the sound discretion of the court whether a witness shall be recalled for re-examination. *Sweet v. Wright & Spencer et al.*, 510.
18. **BILL OF EXCEPTIONS: RULE OF COURT.** *Held*, that a certain rule of

court, set out, did not require the bill of exceptions to be settled and filed within thirty days from the adjournment of court, but that the judge might have fifty days therefor. *Id.*

See INSURANCE, 6.

PLEADING, 6.

STATUTE OF LIMITATIONS, 2.

PRACTICE IN THE SUPREME COURT.

1. JUDGMENT: EVIDENCE TO SUPPORT. A judgment will not be reversed for want of evidence to support it, unless there is such absence of proof as to authorize the conclusion that the judgment was the result of passion or prejudice. *Murray v. Wells*, 26.
2. AMENDED ABSTRACT. An amended abstract not denied will be taken as correct. *Hart v. Jackson*, 75.
3. DISCRETION OF COURT. This court will not interfere with the discretion of the trial court, in refusing to recommit the case to the referee to take testimony omitted by inadvertence. *Jewell v. Reddington*, 92.
4. ———: EXCEPTION: TRANSCRIPT. On rehearing, *held* that the overruling of defendant's motion having been excepted to, it was not necessary to except to the judgment on the verdict; and that the appellee having failed to ask for a transcript or object to the submission on the abstract filed, the case would be determined on its merits. *Aldrich v. Price & Co.*, 151.
5. ABSTRACT: CERTIFICATE: TRIAL DE NOVO. The appellant not having shown, by an amended abstract, that the certificate to the evidence and the bill of exceptions were made and filed in proper time, which facts were denied by the additional abstract of appellees, the cause will not be tried *de novo* or upon error. *Roby v. Hall et al.*, 213.
6. ———: TRIAL DE NOVO. Where the abstract fails to show that it contains all the evidence, this court cannot enter upon an examination of the merits of the case or try the cause anew. *Cassady v. Spofford et al.*, 237.
7. ASSIGNMENT OF ERRORS: WAIVER OF. An assignment of errors, not argued, will be regarded as waived. A party not appealing, can urge no objection in this court to the decree of the court below. *Id.*
8. ATTACHMENT: INVALIDITY OF. The question as to the invalidity of an attachment cannot be raised for the first time in the Supreme Court. *American Express Co. v. Smith & Crittenden et al.*, 242.
9. CERTIFICATION OF EVIDENCE. Where the certificate does not purport to be attached to any evidence, and does not properly identify the evidence, it is defective, and the appeal will be dismissed. *Alexander v. McGrew et al.*, 287.
10. ———: ON REHEARING. Defects of certificate and abstract considered. *Id.*
11. ———: ———. *Held*, that the appellee may supply evidence and still insist the certificate is defective; that the objections to the certificate need not be specifically set out; that the party having the burden of proof, in a trial *de novo*, is entitled to the opening argument; and that overruling a motion to strike out the evidence will not preclude the

court from determining whether the record is such that the case can be examined upon its merits. *Id.*

12. **ASSIGNMENT OF ERRORS: APPEAL.** Where the assignment of errors, although informal, works no prejudice, the appeal will not be dismissed. *University of Des Moines v. Livingston*, 307.
13. **CRIMINAL LAW: TRANSCRIPT.** Where the transcript discloses no error and the verdict appears well supported by the evidence, the judgment below will be affirmed. *The State v. Dumond*, 333.
14. **OBJECTION NOT MADE BELOW.** An objection not presented in the motion to strike, or in any manner raised in the court below, will not be considered. *Wetmore v. McMillan et al.*, 244.
15. **EVIDENCE: JUDGMENT.** Where the judgment of the court below accords with the preponderance of the testimony it will not be disturbed. *Kelsey v. Kelsey et al.*, 383.
16. **EVIDENCE: FINDING OF COURT.** The finding of the court that the plaintiff had failed to establish his claim by a preponderance of evidence, when not opposed to the evidence, will not be disturbed. *Garretson v. Bitzer*, 459.
17. ———: **PREPONDERANCE OF: TRIAL DE NOVO.** The evidence being conflicting, and the case not triable *de novo*, the judgment will not be reversed upon the ground that it is not supported by the preponderance of the testimony. *Crispin v. Winkelman*, 523.
18. **AMENDMENT OF ABSTRACT.** After the final submission of a criminal cause the defendant filed a motion for leave to amend his abstract, but made no showing therefor, and did not ask to set aside the submission. *Held*, that the amendment could not be allowed. *The State v. Hamilton*, 596.
19. **TRIAL BY JURY: EQUITY.** Where the only objection urged by the defendant in the trial court was that the case was designated as in equity, and therefore plaintiff was not entitled to a trial by jury, he cannot raise the objection here that no motion was made to transfer the case to the law docket. A specific objection having been interposed in the court below none other can be considered here. *Searcy v. Miller*, 613.
20. **REINSTATING EVIDENCE.** To justify the court in reinstating the evidence in a case, after it has once been stricken out for the reason it did not appear the evidence had ever been certified, it should at least be shown that it was duly certified within the time required by statute. *Reusch et al. v. The C., B. & Q. R. Co.*, 687.
21. **ERRORS NOT ARGUED.** An assignment of errors not argued, will not be considered. *Smith v. Hickenbottom*, 733.

See JUDGMENT, 6.

TRIAL DE NOVO, 3, 4.

USURY, 2.

PRINCIPAL AND AGENT.

1. **NEGOTIATOR OF LOANS: NOTICE TO.** Where parties sign an application for a loan, agreeing to pay all expenses, the person employed to negotiate the loan is the agent of the borrower, and notice to him of defects in the title is not notice to the lender. *Thomas v. Desney*, 58.

2. **FRAUDULENT ACTS OF.** The fraudulent acts of an agent, committed in the direct line of his employment, will render the principal liable. *Hopkins v. The Hawkeye Ins. Co.*, 203.
3. **GOOD FAITH.** The agent of a party for the negotiation of a loan procured a mortgage from the parties seeking a loan, placed it upon record and then, the loan not having been effected, caused the sheriff's deed under the foreclosure of a prior mortgage to be conveyed to another. *Held*, that good faith required the agent to procure the release of the mortgage, before taking title to the premises, and that the sheriff's deed so procured would be set aside. *Smeltzer v. Lombard et al.*, 294.

See INSURANCE, 3.

PROMISSORY NOTE, 6.

PROMISSORY NOTE.

1. **SIGNING: NEGLIGENCE.** What constitutes reasonable care and diligence in the execution of an instrument is ordinarily a question of fact for the jury. Where a party trusts to the agent of the payee to read a note correctly, without calling upon a member of his family to read it for him before signing, it is not, as a matter of law, negligence. *Hopkins v. The Hawkeye Ins. Co.*, 203.
2. **PRINCIPAL AND SURETY: JOINT NOTE: VERBAL RELEASE OF ONE MAKER.** Where two persons gave their joint note for borrowed money, of which, by an agreement known to the lender, each was to have one-half, it was not a case of suretyship, but each was a principal for the whole amount; and a verbal agreement of the lender upon payment of one-half by one maker to look to the other for the balance due on the note, not shown to have been based upon a consideration, was not binding. *Small v. Older*, 326.
3. **EXTENSION OF TIME: DISCHARGE OF SURETY.** Where the special findings showed an agreement between the payee and the principal for an extension of time on the note sued on, and there was evidence tending to show a consideration therefor, the court was not authorized to infer, in the absence of any finding as to the consideration, that none existed, and the judgment against the sureties was erroneous. *Wendling v. Taylor et al.*, 354.
4. **AGAINST PARTNERSHIP: PURCHASE BY PARTNER.** A partner cannot, by purchase, become the owner of an outstanding note against the partnership, and if, in an attempted compromise of a firm note by one partner, there was a mutual mistake as to the amount due, the payment was good only for the amount paid, and not as full satisfaction of the note. *Easton v. Strother & Conklin et al.*, 506.
5. **EVIDENCE: INDORSERS: SURRENDER OF SECURITY.** Evidence considered and held insufficient to show the surrender by the indorsers, of certain security held by them, upon the belief of payment and discharge of the note. *Id.*
6. **EXECUTED BY AGENT: EVIDENCE.** Where an agent executed a note in the name of his principals, by himself as agent, for the purchase of property to be used in the business of his agency, and the evidence leads to the conclusion that the principals either consented to the purchase, or assented to it afterwards, they will be liable on the note. *Wardner. Mitchell & Co. v. Pattee Bros. & Co.*, 515.

See EQUITABLE JURISDICTION, 4.

MORTGAGE, 5, 8.

PUBLIC FUNDS.

1. **DEPOSIT OF: BY OFFICER.** Where a township clerk deposits public funds in a bank in his individual name, it amounts to a conversion, and the funds become his individual property. *Long v. Emsley et al.*, 11.
2. ———: ———: **GARNISHMENT OF.** Public funds deposited by a township clerk in his individual name, are liable to the process of garnishment, and when paid over, before notice, to the judgment creditor, cannot be recovered by the clerk. *Id.*
3. **GARNISHMENT OF: EXEMPLARY DAMAGES.** In such case, even if the attaching creditor knew the funds were public funds and not the individual fund of the clerk, he would not be liable to exemplary damages. *Id.*

See TOWNSHIP CLERK, 1, 2.

PUBLIC OFFICER.

See TOWNSHIP CLERK.

RAILROADS.

1. **PERSONAL INJURIES: MEDICAL ATTENDANCE.** To recover for medical attendance and medicine, in actions for personal injuries, the value thereof must be established by proof; and where no value is shown, an instruction including reasonable compensation therefor, is erroneous. *Reed v. The C., R. I. & P. R. Co.*, 23.
2. **ORDINARY CARE: EVIDENCE: NEGLIGENCE.** A party cannot be chargeable with negligence for not doing that, which, if done, would afford him no protection; and evidence tending to show that plaintiff's failure to plow around his hay-stacks did not contribute to the loss, was properly admitted. *Lewis v. The C., M. & St. P. R. Co.*, 127.
3. **VERDICT NOT SUSTAINED.** Where the plaintiff did not own, or have any interest in, the land upon which the hay was cut, a verdict, allowing damages for the destruction of the hay by fire set out by an engine, is not sustained by the evidence. Having no property in the thing destroyed, he cannot maintain an action for its destruction. *Id.*
4. **STATUTE PENALTIES: LIMITATION.** An action under chapter 63, acts of the Fifteenth General Assembly, to recover the "forfeiture" as provided therein, is an action to recover a statute penalty; that provision is criminal rather than remedial; and the limitation for the recovery of statute penalties applies. *Herriman v. The B., C. R. & N. R. Co.*, 187.
5. ———: ———: **NOT BARRED.** Where the statute imposes two distinct, not alternative, penalties for the same act, the enforcement of one will not bar the enforcement of the other. *Id.*
6. **TAX IN AID OF: INVALID.** A tax in aid of a railroad, procured to be voted by representations that it would only be enforced as against non-resident tax payers, will not be sustained. *Truesdell v. Green et al.*, 215.
7. ———: **ESTOPPEL.** Where the tax payer did not know prior to the construction of the railroad, that the work was being done on the faith of the tax voted in its aid, he is not estopped from denying the validity of the tax. *Id.*
8. **RIGHT OF WAY: ABANDONMENT OF.** The provisions of section 1260, Code, as amended by act of 1874, in relation to the abandonment of a

railroad line, clearly contemplate there may be an abandonment of a part of a constructed railway. Whether an abandonment exists depends upon the circumstances of each case. *The C. I. R. Co. v. The M. & A. R. Co.*, 249.

9. ———: STATUTE CONSTITUTIONAL. The statute, section 1260, Code, as amended by act of 1874, is constitutional. Following *Noll v. D. B. & M. R. Co.*, 32 Iowa, 66. The constitutionality of so much of the statute as provides for "assessing the damages," will not be inquired into in equity, there being a complete remedy at law. *Id.*
10. ———: ———: BECK, JUSTICE, *dissenting, held*: that a railroad, through its entire extent, must be regarded as a unity; that while there was an intention to complete the work, there could be no abandonment; and that in this case no part of plaintiffs' line had been abandoned. *Id.*
11. TRESPASS: RIGHT OF WAY. Where the petition embraced two causes of action, damages for the trespass and for the right of way taken, and an offer of compromise was made and accepted in the case, both claims were thereby settled and adjusted. *Robertson v. The Central Railway Co.*, 376.
12. COMPROMISE: DEED FOR RIGHT OF WAY. Under the pleadings the compromise stood in place of the judgment of a court, and upon payment of the amount agreed upon the defendant had the right to demand a deed for the right of way, and the court had jurisdiction to order the deed executed. *Id.*
13. CONSTRUCTION OF SIDE TRACKS OVER STREETS. Where a railroad, duly authorized by an ordinance of a city, and also by virtue of section 1321, Revision, constructed its track along a certain street, it was held that the successor in interest of said company had no right, after section 464 of the Code took effect, to construct switches or side tracks on said street without making compensation to the abutting lot owners for injuries resulting therefrom. *Drady v. The D. M. & Ft. D. R. Co.*, 393.
14. ORDINANCE LIMITING SPEED: VOID. Where an ordinance of a city limits the speed of a railway train to four miles per hour, and the road passes through agricultural lands, fenced on both sides, for three miles after entering the limits of the city, and before reaching the inhabited portion thereof, such ordinance operates as a restraint upon commerce, and, as to such portion of the road, is unreasonable and void. *Meyers v. The C., R. I. & P. R. Co.*, 555.
15. CATTLE CHUTES: NEGLIGENCE. Where a railway company erects "cattle chutes" in such close proximity to its tracks as to endanger the lives of its employes, in the proper operation of its trains, it is negligence. If the "chutes" are constructed so as to be reasonably safe for employes operating trains in a reasonable and prudent manner, the company is not chargeable with negligence. *Allen v. The B., C. R. & N. R. Co.*, 623.
16. AWARD OF DAMAGES: APPEAL: OWNER AND MORTGAGEE. Where, in the condemnation of land for railroad purposes, the award of damages was made to the owner and the mortgagee jointly, on proper notice to both parties, the owner may prosecute an appeal therefrom without uniting the mortgagee as a party to such appeal. *Lance v. The C., M. & St. P. R. Co.*, 636.
17. RIGHT OF WAY: GROWING CROPS: DAMAGES. If growing crops were destroyed by the appropriation of the right of way and entry thereunder, the owner may prove the value of the crops as an element of damage. *Id.*

18. ———: **BUILDINGS: INCREASED RISK: EVIDENCE.** Evidence of the value of the building and a grove, and the increased hazard from fire by reason of their proximity to the track, was improperly admitted. It was proper to show the situation, and its effect upon the value of the property may be considered, but the increased danger of the destruction of building, and the like, by fire, is too remote and contingent for legal inquiry. *Id.*
19. **NEGLIGENCE: SPECIAL FINDING: INSTRUCTION.** Several cattle were killed and injured by separate trains of defendant. In an action for the entire damage the defendant asked for special findings as to the amount of damage done by each train. The court submitted the question with an instruction that if the jury found that the damage was done by both trains, and that one train was operated with reasonable care, then they should answer the questions. No special findings were returned with the general verdict, whereupon the defendant moved to require the jury to return answers to the questions, which motion was overruled. *Held* that the instruction was correct and the motion properly overruled; that under the general verdict the questions asked became immaterial, and that the statute, section 2808, Code, does not require special findings of immaterial facts. *Lawson v. The C., R. I. & P. R. Co.*, 672.
20. **RIGHT OF WAY: LANDS CONVEYED SUBJECT TO.** Premises adjacent to a railroad were conveyed to plaintiff, "subject to any right of way said railroad may own over the same." The railroad company had previously become entitled to thirty-five feet in width from the center line of its track as right of way, but there was nothing of record showing the extent of such easement. The railroad was in operation at the time, and a fence had been constructed on one side near the track. *Held*, that plaintiff was advised by the presence of the railroad and the recitals in the conveyances that the railroad company claimed a right of way over the premises, and by inquiry could have learned the extent of that right; and that she must be regarded as having notice of all the facts which due and timely inquiry would have elicited. *Slocumb v. The C., B. & Q. R. Co.*, 675.
21. **PUBLIC USE: DIVERTING COURSE OF STREAM.** A railroad company may, under chapter 191, laws of 1880, condemn lands for right of way for a channel and change the course of a stream, where the safety of the traveling public would be promoted thereby. For such object the land would be taken for a public use, authorizing the exercise of the right of eminent domain, and for that purpose the statute is not unconstitutional. Whether such right exists where merely the convenience and economy of the company would be promoted, not determined. *Reusch et al. v. The C., B. & Q. R. Co.*, 687.
22. **SUBSCRIPTION NOTE: EVIDENCE.** In an action upon a subscription in the form of a note, to aid in the construction of a railroad, it was competent for the defendant to show by the subscription papers and by the declarations of the agent who procured the note, that the railroad was to be built between certain points. The leasing of a part of the road between two points is not a compliance with the contract to construct a road between said points. *Lawrence v. Smith*, 701.
23. **INJURY TO STOCK: DUTY TO CONSTRUCT CATTLE GUARDS.** The statute providing that every corporation operating a railway shall make proper cattle guards, where the same enters and leaves any fenced land, is imperative. The company has the right to fence at all places, except where public convenience excludes that right, as at depot grounds; and under the facts of this case the question, whether the injury was done at a place where it was fit, proper and suitable for the defendant to fence, was properly excluded from the jury. *Mundhenk v. The C. I. R. Co.*, 718.

24. **DOUBLE DAMAGES: AFFIDAVIT FOR: AMENDMENT: SERVICE.** The affidavit, served for the purpose of entitling claimant to double damages for stock killed by a railroad train, need not specifically designate the place where the injury was done. The jurat to such affidavit may be amended within such reasonable time as not to cause essential injury to the other party, and the notice of claim and the accompanying affidavit may be served by the plaintiff or any other person. *Id.*

See **DAMAGE**, 2.

STATUTE OF LIMITATIONS, 1.

TENANT IN COMMON, 1.

RECEIVER.

See **PARTNERSHIP**, 1.

PRACTICE, 3.

RECORD.

See **NOTICE**, 1, 2.

PRACTICE, 9.

WILL, 3.

REDEMPTION.

See **EXECUTION SALE**, 1, 2, 3.

GUARDIAN, 4, 5, 6.

MORTGAGE, 3, 4.

TAX SALE AND DEED, 2, 6.

SURETY, 2.

REFEREE.

1. **FINDINGS OF: EVIDENCE TO SUPPORT.** The findings of the referee, that the plaintiff had actual notice of the rights of the defendants in the farm before he took his mortgage thereon, considered and held to be supported by the evidence. *Jewell v. Reddington*, 92.

REPLEVIN.

1. **INTERVENTION: CROSS-REPLEVIN.** The owner of personal property, held by an officer under a writ of replevin, in another case, to which such owner was not a party, may maintain cross-replevin against the officer for its possession. The remedy by intervention in the first suit is not exclusive. *Davis v. Gambert*, 239.

See **FRAUD**, 6.

SALE.

1. **OF PERSONAL PROPERTY: FRAUD.** The sale of personal property, by an insolvent debtor, for a full consideration, will not be set aside without

proof that the purchaser participated in the fraudulent purpose. *Du-puy & Howell v. Sheak & Sharra*, 361.

2. **CONDITIONAL: WAIVER OF.** Where the sale and delivery of personal property was made with an agreement by the purchaser to give security for the purchase-money, or do some act as a part of the transaction, such sale is conditional, and the title to the property does not pass until the thing is done by the purchaser, or is waived by the vendor. *Thorpe Bros. & Co. v. Fowler et al.*, 541.
3. **FRAUD: RESCISSION OF CONTRACT OF SALE.** Where the vendor rescinded the sale of goods on account of the fraud of the vendee in inducing the sale and delivery, and brought an action to recover the goods, it was not required by law that notice of the rescission of the sale should be given before the action was commenced. *Oswego Starch Factory v. Lendrum*, 573.
4. ———: **CREDITORS: NOTICE OF FRAUD.** The vendor, after the attachment of the goods by the creditors of the vendee, has the right to rescind the sale for fraud perpetrated by the vendee, of which the creditors had no notice. An attaching creditor parts with no consideration, and acquires no greater rights to the property than the vendee had. *Id.*

See FRAUD, 6, 7.

STATUTES CITED, CONSTRUED, ETC.

REVISED STATUTES OF 1843.		Sec. 303. Board of supervisors. <i>Turner & Co. v. Woodbury County</i> , 442.
Page 337, Sec. 2. Cross-replevin. <i>Davis v. Gamberi</i> , 241.		" 382, 383, 384. Dividing townships. <i>Henry et al. v. Taylor et al.</i> , 74.
		" 391. Election. <i>Turner & Co. v. Woodbury County</i> , 442.
CONSTITUTION OF 1846.		
Art. 1, Sec. 4. Religious belief. <i>Searcy v. Miller</i> , 619.		" 456. Nuisance. <i>The City of Centerville v. Miller</i> , 57.
		" 464. Municipal corporations. <i>Drady v. The D. M. & Ft. D. R. Co.</i> , 403-4.
" 465. Sewers. <i>Grimmell v. The City of Des Moines</i> , 146.		
CODE OF 1851.		" 469. Streets. <i>Drady v. The D. M. & Ft. D. R. Co.</i> , 406.
Sec. 35. Heretofore and hereafter. <i>Searcy v. Miller</i> , 619.		" 474, 475. Water-works. <i>Dodge et al. v. The City of Council Bluffs et al.</i> , 564-7.
		" 493. Passage of ordinances. <i>Grimmell v. The City of Des Moines</i> , 146.
" 1407. Dower. <i>Potter et al. v. Worley et al.</i> , 68.		" 614, 616. Election. <i>Turner & Co. v. Woodbury County</i> , 441.
" 2383, 2389. Evidence. <i>Searcy v. Miller</i> , 619.		" 620. Oath of elector. <i>Long v. Long</i> , 498.
REVISION OF 1860.		" 821, par. 2. Assessment. <i>Roberts v. Deeds et al.</i> , 323.
Sec. 38. Operation of statute. <i>Searcy v. Miller</i> , 619.		" 845, 848, 865. Taxes. <i>Jiska v. Ringgold County et al.</i> , 632.
		" 890, 892, 893. Redemption. <i>Will, Guardian, v. Mewkirtler</i> , 548.
" 1321. Railroads. <i>Drady v. The D. M. & Ft. D. R. Co.</i> , 403.		" 897. Tax deed. <i>Roberts v. Deeds et al.</i> , 325.
" 2435. Estate. <i>Potter et al. v. Worley et al.</i> , 67.		" 1090. Corporations. <i>Dodge et al. v. The City of Council Bluffs et al.</i> , 565.
" 2685. Judge disqualified. <i>County of Floyd v. Cheney</i> , 162.		" 1109, 1114. Agricultural fairs. <i>Deller v. The Plymouth County Agricultural Society</i> , 483.
" 2785. Judgment. <i>Marsh v. Mead & Co. et al.</i> , 537.		" 1267. Railroads. <i>Robertson v. The Central Railway Co.</i> , 361.
" 3979. Evidence. <i>Searcy v. Miller</i> , 619.		" 1260, 1261. Right of way. <i>The C. I. R. Co. v. The M. & A. R. Co.</i> , 251.
CODE OF 1873.		" 1523, 1528. Intoxicating liquors, sale of. <i>The State v. Knowles</i> , 671.
Sec. 45. Construction. <i>Deller v. The Plymouth County Agricultural Society</i> , 484.		" 1537, 1538. Intoxicating liquors. <i>Ad-bolt v. Sartori</i> , 668.
" 63. Time statute takes effect. <i>Searcy v. Miller</i> , 619.		
" 197, subdiv. 7. Appearance docket. <i>Haverly v. Alcott et al.</i> , 173; <i>Gifford v. Cole</i> , 273.		
" 200. Petition, when filed. <i>Haverly v. Alcott et al.</i> , 74.		

- Sec. 1540. Sale of liquors, penalty. *The State v. Knowles*, 671.
- " 1555, 1557, 1558. Intoxicating liquors. *Meyers v. Kirt et al.*, 421.
- " 1922. Conditional sale. *Thorpe Bros. & Co. v. Fowler et al.*, 543.
- " 1923. Mortgage. *Howe & Co. v. Jones et al.*, 187-41.
- " 1931. Deed. *Rlee v. Kelso*, 118.
- " 1944. Index, notice by. *Haverly v. Alcott et al.*, 174.
- " 2001. Homestead. *The First National Bank of Davenport v. Baker et al.*, 200.
- " 2007, 2008. Homestead. *Bradshaw v. Hurst et al.*, 747.
- " 2014. Tenant at will. *Martin v. Knapp et al.*, 343.
- " 2018. Landlord's lien. *Clark v. Haynes*, 97.
- " 2077. Interest. *Brockway v. Haller*, 839.
- " 2133. Mechanic's lien. *Valentine v. Rawson et al.*, 131.
- " 2227. Divorce, attachment in. *Wharton v. Wharton*, 697.
- " 2272. Guardianship. *Smith v. Hickendbottom*, 734.
- " 2353. Will. *Kelsey v. Kelsey et al.*, 384.
- " 2363. Executor. *Johnson v. Barker*, 32.
- " 2421. Estate, limitation. *Hadley v. Gregory et al.*, 159.
- " 2452. Widow's share. *Baldosier v. Haynes et al.*, 685.
- " 2454, 2455, 2456. Descent. *Leonard v. Lining*, 649; *Lush v. Lash et al.*, 89.
- " 2457. Heirs of parent. *Lush v. Lash et al.*, 89.
- " 2474, 2475, 2479, 2480, 2481. Settlement of estate. *Hove v. Mowery*, 22.
- " 2512, 2515, 2523. Actions. *Searcy v. Miller*, 617.
- " 2529. Limitation of actions. *Herрман v. The B. C. R. & N. H. Co.*, 138; *Devey v. Lins et al.*, 236.
- " 2546. Assignment. *Miller v. The City of Centerville*, 642.
- " 2566, 2568. Minor, action by. *Kelsey v. Kelsey et al.*, 335.
- " 2610. Action against county. *Ferguson v. Davis County*, 603.
- " 2624, 2343. Notice of action. *Haverly v. Alcott et al.*, 173.
- " 2646, sub. 3. Petition. *The First National Bank of Davenport v. Baker et al.*, 199; *Searcy v. Miller*, 616.
- " 2659. Counter-claim. *Miller v. The City of Centerville*, 642.
- " 2665. Reply. *University of Des Moines v. Livingston*, 312; *Shaw v. Kendig*, 391.
- " 2673. Verification. *First National Bank of Bellaire, Ohio, v. Mason & Co.*, 106.
- " 2683. Intervention. *Howe & Co. v. Jones et al.*, 135; *Grimmell v. The City of Des Moines*, 144.
- " 2680, 2687. Amendment. *Wilcox v. Jackson*, 286.
- " 2689. Amendment. *Tiffany v. Henderson*, 492.
- " 2711. Pleading. *The First National Bank of Davenport v. Baker et al.*, 200.
- " 2712. Pleading. *McIntosh v. Lee*, 359; *Shaw v. Kendig*, 392.
- " 2738, 2739. Trial and judgment. *Shaw v. Kendig*, 391.
- Sec. 2742. Evidence in writing. *Hart v. Jackson*, 76; *Alexander v. McGrew et al.*, 288.
- " 2747. Appearance docket. *Gifford v. Cole*, 273.
- " 2803. Special finding. *Lewis v. The C., M. & St. P. R. Co.*, 129; *Lawson v. The C., R. I. & P. H. Co.*, 674.
- " 2814. Trial by jury. *Gifford v. Cole*, 273.
- " 2837. New trial. *Loomis v. McKenzie*, 82.
- " 2844. Dismissal of action. *Mullen v. Peck*, 431.
- " 2861. Judgment. *Howe & Co. v. Jones et al.*, 132.
- " 2877. Re-trial. *Taylor & Farley Organ Co. v. Plumb et al.*, 35.
- " 2903. Receiver. *Howe & Co. v. Jones et al.*, 142.
- " 2976. Garnishment. *Howe & Co. v. Jones et al.*, 139.
- " 2990, 2997. Release of attachment. *Tuttle v. Wheldon et al.*, 306.
- " 2998. Bond. *Clark v. Haynes*, 97.
- " 3016. Intervention. *Howe & Co. v. Jones et al.*, 135; *Tuttle v. Wheldon et al.*, 306.
- " 3025. Execution. *Merritt et al. v. Grover*, 494.
- " 3026. Attachment for contempt. *The State v. Baldwin*, 271.
- " 3053, 3054. Partnership property. *Dupuy & Howell v. Sheak & Sharra*, 364.
- " 3055. Indemnifying bond. *Davis v. Gambert*, 240.
- " 3068. Stay of execution. *Chase v. Welty*, 233.
- " 3089. Execution sale. *Merritt et al. v. Grover*, 496.
- " 3102. Redemption. *Thayer v. Coldren et al.*, 113; *Chase v. Welty*, 233.
- " 3154. Vacation of judgment. *Loomis v. McKenzie*, 82.
- " 3173. Appeal. *Fisher v. Lane*, 335.
- " 3178, 3179. Appeal. *Loomis v. McKenzie*, 80.
- " 3225. Replevin. *Davis v. Gambert*, 240; *Oswego Starch Factory v. Lendrum*, 578.
- " 3228. Intervention. *Davis v. Gambert*, 241; *Wetmore v. McMillan et al.*, 350.
- " 3273. Mandamus. *Henry et al. v. Taylor et al.*, 73.
- " 3286, 3288. Injunction. *Wharton v. Wharton*, 697.
- " 3452, 3475. Habeas corpus. *Rivers v. Mitchell*, 194.
- " 3516. Practice in justice's court. *Taylor & Farley Organ Co. v. Plumb et al.*, 35.
- " 3541, 3542. Default. *Shaw v. Kendig*, 391.
- " 3543. Judgment set aside. *Taylor & Farley Organ Co. v. Plumb et al.*, 35.
- " 3575. Appeal. *Young v. McWald*, 102.
- " 3637. Evidence. *Searcy v. Miller*, 619.
- " 3639. Evidence. *Haverly v. Alcott et al.*, 172; *Miller v. Dayton*, 426.
- " 3652. Contract. *Garretson v. Bitzer*, 472.
- " 3664. Statute of frauds. *Howe & Co. v. Jones et al.*, 141; *Thorpe Bros. & Co. v. Fowler et al.*, 544.
- " 3804. Justice's fees. *Shaw v. Kendig*, 391.

- Sec. 3808, 3809. Fees. *Turner & Co. v. Woodbury County*, 442.
- " 3904. Larceny. *Bruley v. Rose et al.*, 653.
- " 3960. Resisting officer. *The State v. Conneham*, 352.
- " 4028. Gaming and betting. *Delier v. The Plymouth County Agricultural Soc'y*, 485.
- " 4066, 4067, 4069. Unlawful assemblage. *The City of Centerville v. Miller*, 57.
- " 4071. Racing on highway. *Delier v. The Plymouth County Agricultural Society*, 482.
- " 4089. Nuisance. *The City of Centerville v. Miller*, 57.
- " 4351. Misdemeanor. *The State v. Conneham*, 352.
- " 4423. Acquittal. *The State v. Hamilton*, 599.
- " 4429. Reasonable doubt. *The State v. Jay*, 164.
- " 4461, 4497. Defendant present. *The State v. Conneham*, 353.
- " 4539. Appeal by state. *The State v. Vall*, 104.
- " 4559. Accomplice. *The State v. Allen*, 434.
- " 4560. Evidence. *The State v. Porter*, 674.
- " 4596. Bail. *The State v. Conneham*, 353.
- " 4697, 4698. Bail on appeal. *Anderson v. Park*, 70.

LAWS OF 1870.

- Chap. 91. Railroads. *The C. I. R. Co. v. The M. & A. R. Co.*, 261-63.

CODE OF 1873.

- Chap. 4, title 10. Taking private property. *Drady v. The D. M. & Ft. D. E. Co.*, 406.

LAWS OF 1874.

- Chap. 6. Powers of cities. *Drady v. The D. M. & Ft. D. E. Co.*, 403.
- " 47. Railroads. *Drady v. The D. M. & Ft. D. E. Co.*, 403.
- " 66. Nonuser. *The C. I. R. Co. v. The M. & A. R. Co.*, 261.
- " 68. Railroad tariffs. *Herriman v. The B., C. R. & N. R. Co.*, 188.

LAWS OF 1876.

- Chap. 107, Sec. 1. Construction of sewers. *Grimmell v. The City of Des Moines*, 146.

LAWS OF 1878.

- Chap. 162. Sewerage. *Grimmell v. The City of Des Moines*, 146.

LAWS OF 1880.

- Chap. 75. Pharmacy. *State v. Knowles*, 670.
- " 163. Appeal from justice. *Young v. McWald*, 102.
- " 191. Railroads. *Reusch et al. v. The C., B. & Q. R. Co.*, 687.

STATUTE OF FRAUDS.

1. AGREEMENT TO EXECUTE A NOTE AS SURETY. Where one agrees to execute a note as surety for another, such an agreement is a promise to answer for the debt or default of that other, and is within the statute of frauds, unless the agreement is in writing. *Dee v. Downs*, 589.

See ASSIGNEE AND ASSIGNMENT, 3.

TRUST, 1, 2.

STATUTE OF LIMITATIONS.

1. DAMAGES: FORFEITURE. The essential idea of "forfeiture" is a loss of property by way of punishment, and as used in the statute it indicates something more than compensation; and where so much of the claim as embraces a statute penalty is barred, the whole will be barred, for the same provisions of the statute of limitations must be applied to the entire claim. *Herriman v. The B., C. R. & N. R. Co.*, 187.
2. INSTRUCTION: PRACTICE. Where the evidence showed that if any cause of action existed it must have arisen within five years before the commencement of the suit, an instruction excluding the question of the statute of limitations from the jury was proper. *Hoschl v. The City of Muscatine*, 444.
3. FRAUD: DILIGENCE. Where an action is brought to recover on the ground of fraud, the statute of limitations does not commence to run until the discovery of the fraud, and a party is not required to plead

and show diligent efforts to fasten the fraud upon a person, where he was ignorant that such person had any connection with the business, in order to arrest the bar of the statute. *Clews v. Traer et al.*, 459.

See MORTGAGE, 4.

NUISANCE, 1.

PLEADING, 1.

RAILROADS, 4.

TOWNSHIP CLERK, 3.

TRUST, 4.

SUBROGATION.

See INSURANCE, 1.

PARTNERSHIP, 3.

SUBSCRIPTION.

1. CONSIDERATION FOR. A subscription for the purpose of paying off a debt already incurred, and where no new liability or obligation was assumed upon the faith of the same, is without consideration, and cannot be enforced. *University of Des Moines v. Livingston*, 307.
2. ———: EVIDENCE OF IMPROVEMENTS. Evidence of raising money and of making improvements, which, if done in consequence of and relying upon the subscription in question, would constitute a consideration sufficient to support the subscription, was improperly excluded from the jury in this case. *Id.*

STREETS.

1. DEDICATION IN PAIS: CITY PLAT. Where a party has dedicated land, by acts *in pais*, for a public street, and the public has accepted the dedication and acquired a right thereto, he cannot defeat that right by subsequently filing a city plat, covering a portion of the same land. *Getchell et al v. Benedict*, 121.

SURETY.

1. LIABILITY OF: EXECUTION: STAY BOND. Where the surety, against whom judgment is rendered, fails to object to a stay of execution taken by the principal, he will be presumed to have consented to such stay; and in that case, the surety on the stay bond, as between him and such original surety, will not be charged with primary liability to pay the judgment. *Chase v. Welty*, 230.
2. ———: WAIVER OF REDEMPTION. Where the original surety makes no objection to a stay of execution on the judgment, he is presumably a party thereto, and has thereby waived his right to redeem his lands subsequently sold on execution to satisfy the judgment. *Id.*

See BOND, 1.

INTOXICATING LIQUORS, 3.

JUDGMENT, 5.

PROMISSORY NOTE, 2, 3

TAXATION.

1. **ASSESSMENT: IMPROVEMENTS ON LAND.** While the improvements upon land, such as a patent limekiln and railroad switch, should be taken into consideration in determining the value of the land for the purposes of assessment and taxation, yet it is wholly immaterial whether the valuations of the land and the improvements are aggregated or stated separately. *Robertson v. Anderson*, 165.

See **DEDICATION**, 2.

TAXES.

1. **DELINQUENT: INNOCENT PURCHASER.** Where the purchaser of real estate obtained a certificate from the treasurer that there were no delinquent taxes on the property, and the tax books did not show any tax to be due, but it was afterwards found there were delinquent taxes due thereon at the time, which had not been brought forward in the tax books, he would be an innocent purchaser, and would take such real estate free from all liens for taxes. *Jiska v. Ringgold County et al.*, 630.
2. ———: ———: **WHEN NOT A LIEN.** In such case, if the delinquent taxes are brought forward in the tax books after the purchase, they will not be a lien upon the property as against the purchaser. *Id.*

See **DOWER**, 1.

RAILROADS, 6, 7.

TAX SALE AND DEED, 5.

TAX SALE AND DEED.

1. **WHEN VOID: BONA FIDE PURCHASER.** Where the treasurer, after the adjournment of a tax sale, executed certificates, without a sale, to a pretended purchaser, pursuant to a prior private agreement with him, the tax titles and deeds based upon such certificates were absolutely void, and a purchaser thereunder, by warranty deed, for value and without notice, would not be protected as an innocent purchaser. *Truesdell v. Green et al.*, 215.
2. **REDEMPTION: EQUITIES.** A party will not be allowed to redeem lands from tax sale after the expiration of the statutory period for redemption, unless the evidence shows strong equities entitling him to relief. *Harrison v. Owens*, 314.
3. **DESCRIPTION: UNCERTAINTY OF.** Where the description of the property in the tax books and tax deed was not sufficiently certain to identify the land and to enable a surveyor to locate it, the tax deed will be void; and the defect in the description cannot be cured by extraneous evidence. *Roberts v. Deeds et al.*, 320.
4. ———: ———: **SALE INVALID.** The defect in the description would invalidate a sale made to enforce a lien for the taxes upon personal property, as well as a sale for the taxes upon the land itself. *Id.*
5. ———: **TAXES PAID BY PURCHASER: RECOVERY OF.** Where the tax sale and deed transferred no interest in the land in question, for the reason that there was no description of the property in any of the proceedings, the purchaser cannot recover the amount of taxes paid by him. *Id.*

6. **MORTGAGE: REDEMPTION.** The holder of a tax-title has no right to redeem the lands embraced in his deed, from a mortgage thereon held in trust for a minor. *Will, Guardian, v. Mechirter*, 545.

TENANT AT WILL.

1. **WHEN CREATED: POSSESSION.** The failure of the owner, out of possession, to object to the possession of another, will not alone create a tenancy at will, and where the person in possession holds adversely, no tenancy at will exists. *Martin v. Knapp et al.*, 336.
2. **GROWING CROPS.** Where one becomes a tenant at will he takes the premises in their then condition, and is entitled to crops growing thereon. *Id.*

TENANT IN COMMON.

1. **DEED BY ONE: BREACH OF CONDITIONS: DAMAGES.** Where one of two tenants in common deeded the right of way through their premises to a railroad company upon certain conditions, and the company entered, but failed to comply with the conditions, the tenant granting the deed can maintain an action to recover damages for breach of contract, and the other, the entry being without her consent, for the trespass. *Rush et al. v. The B., C. R. & N. R. Co.*, 201.

TENDER.

1. **FOR DEBT AND COSTS.** A tender made after suit was brought, specifying that a certain portion of the amount paid into the court was to be applied to the debt and the balance to the costs, is proper and not conditional. *Young v. McWaid*, 101.

See **BOND**, 2.

JUDGMENT, 4.

TOWNSHIP.

See **MANDAMUS**, 1.

TOWNSHIP CLERK.

1. **PUBLIC FUNDS: ACTION FOR.** A township clerk may maintain an action to recover public funds in the hands of third persons. *Long v. Emstley et al.*, 11.
2. ——— : ——— : **DEPOSIT OF.** Where a township clerk deposits public funds in a bank in his individual name, it amounts to a conversion, and the funds become his individual property. *Id.*
3. **CLAIM OF: STATUTE OF LIMITATIONS.** Where the township clerk paid a road order drawn on him by the township trustees, but failed to have the same audited and allowed in his regular settlement with the trustees, the statute of limitations commenced to run thereon from the date of the first settlement, at which the claim should have been presented and paid. *Decey v. Lins et al.*, 235.

See **PUBLIC FUNDS**, 1, 2, 3.

TRIAL.

1. **STIPULATION FOR BEFORE JUDGE: AMENDMENT.** Where the parties by a written stipulation provided for a trial before the judge, the acts, doings, rulings and decisions of the judge to stand in all respects as the action of the court, the judge thereunder had the same power to allow amendments as though the trial had been in open court. *Clegg v. Traer et al.*, 459.

TRIAL DE NOVO.

1. **EVIDENCE: CERTIFICATE OF: JUDGE.** Where the certificate of the judge was that the record contained "all the evidence used on the trial," but failed to show that no other evidence was offered and rejected, it is a certificate of the evidence received only, and is not sufficient to authorize a trial *de novo*. *Hart v. Jackson*, 75.
2. **EVIDENCE WRITTEN OUT: CERTIFICATE.** Where the testimony was written out and filed before the final submission of the case, and the judge's certificate was in proper form, held sufficient to entitle appellant to a trial *de novo*. *Weir v. Day*, 84.
3. **PRACTICE.** In this case, as no prejudice could result, the case was tried *de novo*. *McClain v. McCluin*, 167.
4. **WHAT ABSTRACT MUST SHOW.** A case will not be tried *de novo* in this court, unless the abstract shows affirmatively that it contains all the evidence offered and admitted in the court below. A recital of the certificate of the judge, that all the evidence is contained in the transcript, does not amount to a showing that all the evidence is presented in the abstract. *Conwell v. House et al.*, 754.

See PRACTICE, 5, 6, 11, 17.

TRUST AND TRUSTEE.

1. **EXPRESS: CONVEYANCE: PAROL TESTIMONY.** An agreement to accept a conveyance of real estate in trust, and reconvey to the trustee, thereby creating an express trust, cannot be established by parol testimony. *McClain v. McClain*, 167.
2. ———: **STATUTE OF FRAUDS.** Where the conveyance in trust was made voluntarily, without solicitation or undue influence, and no fraud is shown prior to or contemporaneous with the execution of the deed, but consists in denying and repudiating the agreement to reconvey, it will not remove the case from the operation of the statute of frauds. *Id.*
3. **STEP-FATHER.** It is not incumbent upon a step-father to extinguish a mortgage upon the real estate of his minor step-children, and thus preserve their inheritance; and he has the same right to acquire title to such real estate that a stranger has. *Otto et al. v. Schlappkahl et al.*, 226.
4. **DISOWNER OF BY TRUSTEE: STATUTE OF LIMITATIONS.** The statute of limitations will run in favor of the trustee of a resulting or constructive trust, from the time he disowns the trust and claims title in his own right. *Id.*
5. **FRAUDULENT PURCHASE OF TRUST PROPERTY.** The testimony in this case, in respect to the purchase of corporate stocks, considered, and held sufficient to establish that the property in question was purchased by means

of the fraudulent concealments and misrepresentations of one of the defendants, who held the property as trustee for plaintiff; that his wife, the other defendant, had knowledge of and participated in said fraudulent acts; and both were liable for the value of the property, less the amount paid. *Clews v. Traer et al.*, 459.

See FRAUD, 3.

USURY.

1. PAYMENT IN FULL: NEW CONTRACT. The original indebtedness cannot be revived after it is once paid in full and discharged. The new contract, though figured on the basis of the original indebtedness, is not usurious, when not a device to cover usury. *Hoopes v. Ferguson*, 39.
2. PRACTICE. The question of usury not having been made in the court below, cannot be first presented here. *Wendling v. Taylor et al.*, 354.
3. BURDEN OF PROOF: EVIDENCE. The burden of showing that any particular transaction was usurious is upon the party pleading usury by way of defense. The evidence in this case considered and held not sufficient to establish the defense of usury. *Hough v. Hamlin et al.*, 359.

VENDOR AND VENDEE.

See ATTACHMENT, 2.

FRAUD, 6, 7.

SALE, 3, 4.

VENUE.

1. CHANGE OF: AUTHORITY OF THE COURT. A court has no authority upon its own motion to change the venue of a case, whether for the trial of a part or all the issues involved therein; and the fact that an application for a change of venue had been filed and sustained in another case involving the same issues, is no ground for such change. *Bennett v. Carey*, 221.
2. ———: WAIVER OF. An erroneous order for a change of venue is not waived by the party going to trial, without objection in the court to which the case is sent. *Id.*

VERDICT.

1. INDEFINITE: EQUITY. Where the verdict is indefinite and does not express the true intention of the jury, the mistake or omission being known upon the return of the verdict, a complete and adequate remedy exists at law, and relief therefor cannot be sought in equity. *McFaul v. Woodbury County*, 99.
2. EVIDENCE: SUFFICIENCY OF TO SUSTAIN VERDICT. Where the evidence of negligence does not show such an absence of proof as to authorize the conclusion that the verdict was the result of passion or prejudice, the judgment will not be disturbed. *Lawson v. The C., R. I. & P. R. Co.*, 672.

See JURY, 1.

PRACTICE, 4.

RAILROADS, 3.

VERIFICATION.

1. **BY OFFICER OF COMPANY: SUFFICIENCY OF.** Where in an action by an indorsee upon an acceptance drawn by a company, the verification was made by the secretary, who was also a member of such company, and showed affiant was familiar with the transactions, it is sufficient. *First National Bank of Bellaire, Ohio, v. Mason & Co.*, 105.

WAIVER.

See **APPEAL**, 5.

PRACTICE IN THE SUPREME COURT, 7.

SURETY, 2.

WARRANTY.

See **INSURANCE**, 4, 5.

WILL.

1. **RIGHTS UNDER: DOWER.** On rehearing, *held* that under section 2435, Revision, the widow was not required to object to or relinquish her rights under the will before she could claim dower, where her dower was in fee simple and vested immediately. *Potter et al. v. Worley et al.*, 66.
2. **ACTION TO CONSTRUE: GUARDIAN AD LITEM.** Where an action was brought to construe and enforce a will, and the guardian *ad litem* of a minor legatee filed a cross-petition directly attacking its validity, it will be regarded as made in an original action, contemplated by section 2353, Code, and the guardian *ad litem* in such an action can lawfully interpose the question of the invalidity of the will. *Kelsey v. Kelsey et al.*, 383.
3. **ACCEPTANCE OF BY WIDOW: ENTERED OF RECORD: EVIDENCE OF.** The acceptance by a widow of the provisions of a will, in lieu of dower, in order to be binding upon her, under section 2452 of the Code, must be made within six months from the time she received notice of its provisions; and such acceptance must be entered in the proper records of the Circuit Court and be evidenced by such record, and no other evidence thereof is sufficient or competent. A written notice of acceptance, not entered of record, is not sufficient. *Baldozier v. Haynes et al.*, 683.

See **ADMINISTRATOR**, 4.

DESCENT, 1.

DOWER, 6.

44. S. A. A.

